TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]352

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

FELIPE SANDOVAL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

FILED SEPTEMBER 26, 1911.

(23373.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 798.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

FELIPE SANDOVAL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

INDEX.

61346—12——1

a *Writ of error from the Supreme Court of the United States to the District Court of the State of New Mexico.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the District Court of the United States for the District of New Mexico, greeting:

Because in the records and proceedings, and also in the rendition of the judgment sustaining a demurrer to an indictment, which is in the said district court before you, between United States of America, plaintiff, and Felipe Sandoval, defendant, a manifest error has happened, to the great damage of the United States of America, as by its indictment appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under your seal, distinctly and openly, send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, on the 12th day of October, 1912, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of August, in the year of our Lord one thousand nine hundred and twelve, and of the independence of the United States of America the one hundred and thirty-seven.

HARRY F. LEE,
Clerk of the District Court of the United States for the District of New Mexico.

Allowed by—

WM. H. POPE,
District Judge.

b (Endorsed:)

UNITED STATES OF AMERICA,
District of New Mexico, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the United States District Court for the District of New Mexico.

[SEAL.]

HARRY F. LEE,
Clerk of the United States District Court for the District of New Mexico.

c (Endorsed:)
14. In the District Court of the United States for the District of New Mexico. United States of America, plaintiff, vs. Felipe Sandoval, defendant. Writ of error. Filed Aug. 14, 1912. Harry F. Lee, clerk.

d UNITED STATES OF AMERICA,
To Felipe Sandoval, greeting:

You and each of you are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C., sixty days from the date hereof, pursuant to writ of error filed in the clerk's office of the United States District Court for the District of New Mexico, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the United States District Court for the District of New Mexico, this 14th day of August, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] WM. H. POPE,
Judge of the District Court of the United States for the District of New Mexico.

We hereby, this 14th day of August, 1912, accept due personal service of this citation on behalf of Felipe Sandoval, defendant in

RENEHAN & WRIGHT,
Attorneys for Defendant in Error.

e (Endorsed:) No. 14. United States of America, plaintiff in error, vs. Felipe Sandoval, defendant in error. Citation to defendant in error. Filed Aug. 14, 1912. Harry F. Lee, clerk.

1 *Writ of error from the Supreme Court of the United States to the District Court of the State of New Mexico.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United State of America to the judge of the District Court of the United States for the District of New Mexico, greeting:

Because in the records and proceedings, and also in the rendition of the judgment sustaining a demurrer to an indictment, which is in the said district court before you, between United States of America, plaintiff, and Felipe Sandoval, defendant, a manifest error has happened, to the great damage of the United States of America, as by its indictment appears. We being willing that error, if any has

been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under your seal, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, on the 12th day of October, 1912, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of August, in the year of our
2 Lord one thousand nine hundred and twelve, and of the independence of the United States of America the one hundred and thirty-seven.

[SEAL.] HARRY F. LEE,
Clerk of the District Court of the United States for the District of New Mexico.

Allowed by—

WM. H. POPE,
District Judge.

UNITED STATES OF AMERICA,
District of New Mexico, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the United States District Court for the District of New Mexico.

[SEAL.] HARRY F. LEE,
Clerk of the United States District Court for the District of New Mexico.

3 *United States of America, to Felipe Sandoval, greeting:*

You and each of you are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C., sixty days from the date hereof, pursuant to writ of error filed in the clerk's office of the United States District Court for the District of New Mexico, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the United

States District Court for the District of New Mexico, this 14th day of August, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

WM. H. POPE,
Judge of the District Court of the United States for the District of New Mexico.

We hereby, this 14th day of August, 1912, accept due personal service of this citation on behalf of Felipe Sandoval, defendant in error.

RENEHAN & WRIGHT,
Attorneys for defendant in error.

4 Be it remembered that heretofore, to wit, on the 5th day of April, 1912, there was presented in open court and filed in the office of the clerk of the United States District Court for the District of New Mexico an indictment, which said indictment was and is in the words and figures as follows, to wit:

United States of America, District of New Mexico.

In the District Court of the said District of New Mexico, held for the trial of causes and offenses against the laws of the United States arising under the constitution and laws thereof, within the district aforesaid, at the April term, in the year of our Lord nineteen hundred and twelve.

The grand jurors of the district aforesaid, taken from the body of good and lawful men of the district aforesaid, duly empaneled, sworn, and charged, at the term aforesaid, to inquire in and for the body of the district aforesaid into crimes and offenses committed against the laws of the United States within said district, upon their oath do present:

That Felipe Sandoval, late of the district of New Mexico, on the nineteenth day of March, in the year of our Lord nineteen hundred and twelve, at the district aforesaid, unlawfully and feloniously did introduce into the Indian country, to wit, the Santa Clara Pueblo, in the district aforesaid, certain*ing* intoxicating liquor, to wit, two quarts of wine, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

H. W. CLARK,
Asst. United States Attorney for the District of New Mexico.

5 (Endorsed:) No. 14. In the United States District Court for the District of New Mexico. United States of America, plaintiff, v. Felipe Sandoval, defendant. Introducing liquor on the Santa Clara Pueblo, being Indian country. A true bill. D. J. Rankin, foreman grand jury. Witnesses: Jose Antonio Montoya, Maximiliano Cruz, Elogio Castellano. Filed April 5, 1912. Harry F. Lee, clerk.

And, thereafter, on to wit, May 7, 1912, there was filed in the office of the clerk of said court, a demurrer, which said demurrer was and is in the words and figures as follows, to wit:

In the District Court of the United States for the District of New Mexico.

THE UNITED STATES,
vs.
FELIPE SANDOVAL.

Demurrer.

6 And the said Felipe Sandoval in his own proper person comes into court, and, having heard read the said indictment, says that the said indictment and the matters therein are, as therein alleged and set forth, not sufficient in law to compel him, the said Felipe Sandoval, to answer thereto; and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said Felipe Sandoval prays judgment, and that by the court he may be dismissed and discharged of the said indictment:

And the said Felipe Sandoval shows to the court the following causes of demurrer to the said indictment, that is to say:

1. That it appears upon the fact of the indictment that no offense against the laws of the United States has been committed by this defendant.

2. That the indictment shows upon its face that the District Court of the United States, in and for the District of New Mexico, has no jurisdicion thereof.

3. That the acts charged in the said indictment to have been committed by the defendant do not make or constitute any offense against the laws of the United States, or of which the United States Court for the District of New Mexico has jurisdiction.

4. That the acts charged in the said indictment do not constitute an offense under the provisions of section 2139 of the Revised Statutes of the United States.

5. That the acts charged in the said indictment do not constitute an offense under the provisions of section 2140 of the Revised Statutes of the United States.

7 6. That the acts charged in the said indictment do not constitute an offense under the provisions of any statute of the United States.

7. That the acts charged in said indictment do not constitute an offense cognizable or tryable in the District Court for the District Court for the District of New Mexico.

8. And also that the said indictment is in other respects uncertain, informal and insufficient.

And this and all of these the defendant is ready to verify.

RENEHAN & WRIGHT,
Attorneys for defendant, Santa Fe, N. M.

(Endorsed:) Filed May 7, 1912. Harry F. Lee, clerk.

And, thereafter, on to wit, July 23d, 1912, there was filed in the office of the clerk of the said court, a stipulation, which said stipulation was and is in the words and figures as follows, to wit:

In the District Court of the United States for the District of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FELIPE SANDOVAL, DEFENDANT.
} No. 14. Introducing liquor into Indian country.

8 *Stipulation.*

It is hereby stipulated and agreed, by and between counsel for the parties hereto, for the purposes of the demurrer to the indictment only, as follows:

1. That the Pueblo Indians of Santa Clara are Pueblo Indians of New Mexico.

2. That the lands of the said Pueblo Indians of Santa Clara, known as the Pueblo grant of Santa Clara, were owned and occupied by them upon the 20th day of June, 1910, and at the time of the admission of New Mexico as a State, and are such lands as are designated Indian country in sec. 8 of Art. XXI of the constitution of the State of New Mexico.

3. That said Indians acquired right and title to and ownership, in fee simple, of said grant through a prior sovereignty, to wit, the Kingdom of Spain.

4. That as to the locus of the offense sought to be charged in the indictment in said case, the title of the said Indians has not been extiguished.

5. That this stipulation shall be deemed to have been filed nunc protunc as of the date of the argument upon the demurrer and shall be deemed and considered as part of any record upon appeal in event a writ of error shall be sued out without the necessity of the court signing and settling the same as a bill of exceptions.

LEROY O. MOORE,
Asst. United States District Attorney.
RENEHAN & WRIGHT,
Attorneys for defendant, Santa Fe, New Mexico.

9 (Endorsed:) Filed July 23rd, 1912. Harry F. Lee, clerk.

And, thereafter, on to wit, July 23rd, 1912, the court made an order sustaining the demurrer heretofore filed herein, and entered a judgment of dismissal, which said order of the court was and is in the words and figures as follows, to wit:

In the United States District Court for the District of New Mexico.

UNITED STATES, PLAINTIFF,
vs.
FELIPE SANDOVAL, DEFENDANT.

Judgment of dismissal.

This cause coming on regularly to be heard upon the defendant's demurrer to the indictment, and the court having heard E. R. Wright, of counsel for the defendant, in support of said demurrer, and Stephen B. Davis, jr., United States attorney, and Francis C. Wilson, special attorney for the Pueblo Indians, in opposition thereto, and being fully advised in the premises, doth sustain said demurrer, and it is therefore ordered, adjudged, and decreed that said indictment be, and the same is hereby, dismissed, to which ruling of the court the plaintiff excepted.

Dated at Santa Fe this 23rd day of July, 1912.

WM. H. POPE,
District Judge, etc.

And, thereafter, on to wit, August 14th, 1912, there was filed in the office of the clerk of said court a petition for writ of error, which said petition was and is in the words and figures as follows, to wit:

In the District Court of the United States for the District of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FELIPE SANDOVAL, DEFENDANT.

No. 14. Introducing liquor into the Indian country.

Petition for writ of error.

Now comes the United States of America, plaintiff herein, and says that on or about the 23rd day of July, 1912, the district court entered judgment herein in favor of the defendant, sustaining the demurrer and dismissing the indictment against the defendant, in which judgment and the proceedings had prior thereto in this case, certain errors were committed to the prejudice of this plaintiff, all of which was filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue out of the Supreme Court of the United States under the provisions of the act of March 2, 1907, chapter 2564, 34 Statutes at Large, 1246, for the correction of errors here complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

STEPHEN B. DAVIS, JR.,
United States Attorney.

(Endorsed:) Filed Aug. 14, 1912. Harry F. Lee, clerk.

And, thereupon, on the same day, to wit, August 14, 1912, there was filed in the office of said clerk an assignment of errors, which said assignment of errors was and is in the words and figures as follows, to wit:

In the District Court of the United States for the District of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* FELIPE SANDOVAL, DEFENDANT.	No. 14. Introducing liquor into Indian country.

12 *Assignment of errors.*

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors which it avers exists:

1. The court erred in sustaining the demurrer of the defendant.

2. The court erred in quashing the indictment.

3. The court erred in so construing the statute upon which the indictment in this case was founded, namely, the act of January 30, 1897 (29 Stat., 506), as to exclude from its provisions the lands of the Pueblo Indians in New Mexico, and particularly the lands in the indictment in this case.

4. The court erred in holding that the act of Congress of the United States of June 20, 1910, admitting New Mexico as a State (36 Stat., 557), was invalid in so far as said act attempted to extend the provisions of the said act of January 30, 1897, to the lands of the Pueblo Indians of New Mexico.

5. The court erred in holding that Congress in admitting New Mexico as a State had no power to reserve to the Congress of the United States absolute jurisdiction and control over the lands of the Pueblo Indians of New Mexico.

6. The court erred in holding that the provisions of the act of Congress, approved June 20, 1910, entitled "An act to enable the people of New Mexico to form a constitution, etc.," 36 Stat., 557, including all lands owned or occupied by the Pueblo Indians of New Mexico at the date of the passage of said act within the term "Indian country," and reserving jurisdiction and absolute control over such lands in the Congress of the United States, and excepting such lands

13 from taxation by the State of New Mexico, and subjecting such lands after alienation by the Indians for a period of twenty-five years to the laws of the United States, prohibiting the introduction of liquor into the Indian country, are void.

7. The court erred in holding that the imposition upon the State of the above conditions concerning the lands of the Pueblo Indians of New Mexico resulted in admitting the State of New Mexico upon a

different footing than that upon which the other States of the Union were admitted.

8. The court erred in holding that the Pueblo Indians of New Mexico are not and never have been wards of the National Government, and are not and never have been an alien and dependent people, concerning whom the Congress of the United States has a constitutional right to legislate.

9. The court erred in holding that the Congress had no power to declare the lands comprised within Indians Pueblos, Indian country, and to regulate the liquor traffic with such Indians, and that such regulation was necessarily a part of the police power of the State.

STEPHEN D. DAVIS, Jr.,
United States Attorney.

(Endorsed:) Filed Aug. 14, 1912. Harry F. Lee, Clerk.

And, thereupon, on the same day, to wit, August 14, 1912, the court made an order allowing writ of error, which said order was and is in the words and figures as follows, to wit:

14 In the District Court of the United States for the District of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* FELIPE SANDOVAL, DEFENDANT.	No. 14. Introducing liquor into the Indian country.

Order allowing writ of error.

This 14th day of August, 1912, comes the plaintiff, by its attorneys, and files herein and presents to the court its petition praying for the allowance for a writ of error and an assignment of errors intended to be urged, and praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error in accordance with said prayer.

WM. H. POPE,
District Judge.

15 And, heretofore, on, to wit, the 23rd day of July, 1912, there was filed in the office of the clerk of said court, an opinion on demurrer, which said opinion was and is in the words and figures as follows, to wit:

In the United States District Court for the District of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
FELIPE SANDOVAL, DEFENDANT. } No. 14.

Opinion.

(District Court, D. New Mexico, July 23, 1912.)

SYLLABUS BY THE COURT.

1. The American form of government contemplates a union of equal States.

2. Congress may not, save in the exercise of a power conferred by the Constitution, reserve to itself in the admission of a new State police power exercised by the other States.

3. The regulation of the sale of liquor is an exercise of the police power.

4. Where such sale affects citizens of a State upon premises unconditionally owned by such citizens, the exercise of the police power thereover is ordinarily for the State, not for the Nation.

5. The Pueblo Indians of New Mexico were considered citizens of the Republic of Mexico, and under the treaty of Guadalupe Hidalgo of 1848 they became citizens of the United States.

6. The Pueblo Indians of New Mexico hold their lands by unconditional patents from the United States, issued in recognition of titles granted them by the Government of Spain centuries ago.

7. As to such Indians holding their lands under such tenure, it was not within the power of Congress in admitting New Mexico as a State to declare such lands Indian country, or to reserve to the Federal Government the power to regulate the liquor traffic with such
17 Indians, the latter being a part of the police power which necessarily went to the State upon its admission.

8. The provisions of the New Mexico enabling act of June 20, 1910, 36 Stat., 557, designed to the results last named are void.

On demurrer to indictment for introduction of liquor into the Indian country in violation of the act of January 30, 1897, 29 Stat., 506. Demurrer sustained.

Stephen B. Davis, jr., U. S. attorney; Herbert W. Clark, assistant U. S. attorney; Leroy O. Moore, assistant U. S. attorney, for the United States.

Renehan & Wright for the defendant.

18 POPE, District Judge: The defendant, Felipe Sandoval, has been indicted under the act of January 30, 1897, 29 Stat., 506, for "introducing liquor into Indian country, to wit, the Santa Clara Pueblo." The portion of that act here relevant is as follows:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

A demurrer has been interposed which attacks the indictment as stating no offense against Federal law. It seems clear that, independent of certain legislation, to be presently considered, surrounding the admission of New Mexico as a State, the demurrer would have to prevail. The precise question was considered by the Supreme Court of New Mexico in United States v. Mares (14 N. M., 1), being a prosecution under the act of 1897 for selling liquor to a Pueblo Indian, and it was there held, upon what we believe to be adequate reasoning, that the Pueblo Indians are not within the terms of the act of 1897. This much is not seriously contested.

19 The real controversy arises upon certain provisions of the act of June 20, 1910 (36 Stat., 557), enabling the people of New Mexico and Arizona to form a constitution and State government. It is therein enacted that the constitution of New Mexico to be framed shall provide, "by an ordinance irrevocable without the consent of the United States and the people of said State, * * * that * * * the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited." The act further requires a similar ordinance to the effect "that the people * * * forever disclaim all right or title to * * * all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the United States." It is further required

by the act that the constitution as framed shall contain an ordinance providing: "That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of 25 years after such allotment, sale, reservation, or other disposal, to all the laws of the United States prohibiting the introduction of liquor into Indian country, and the term 'Indian country' shall include the Pueblo Indians of New Mexico and
20 the lands now owned or occupied by them." The constitution of New Mexico as framed, and approved by the President of the United States, contains ordinances (declared to be irrevocable without the consent of the United States and the people of the State) containing in so many words the above-quoted provisions required by the enabling act. There is no doubt that these several provisions are broad enough to constitute lands now owned or occupied by the Pueblo Indians Indian country. If, therefore, the terms of the enabling act are to be given the effect resulting from its language, the indictment is good, otherwise not. This brings up for determination the highly important and delicate question of the power of Congress to impose upon the admission of New Mexico the terms above disclosed. The solution of this involves a careful consideration of the status of the Pueblo Indians of New Mexico and of their land tenure. These questions, while most interesting, are largely fallow field. A long line of decisions have covered the subject. The first case discussing the matter was United States v. Lucero, 1 N. M., 422, decided in 1869. There the defendant was sued for the penalty imposed by the intercourse act of June 30, 1834, 4 Stat., 730, for settling on lands belonging to "the Pueblo Tribe of Indians of the pueblo of Cochiti." In sustaining a demurrer to the petition the Supreme Court of New Mexico, speaking through Chief Justice Watts, points out radical differences in character between the Pueblo Indians and what are known as the tribal Indians, saying: "They (the Spanish adventurers) found the Pueblo Indians on their advent into New Mexico a peaceful, quiet, and industrious people, residing in villages for their protection against the wild Indians, and living by the cultivation of the soil." As to their land
21 holdings it is pointed out that the Spanish acknowledged their title to the land upon which they were residing, and evidenced this by a written agreement dated as far back as 1689 (1 N. M., 455). The Lucero opinion further shows that so long as the Spanish rule continued in America these titles were respected, and that when Mexico became independent of Spain the plan of Iguala, of February 24, 1821, conferred citizenship upon these Indians in the following declaration: "That all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this Monarchy, with a right to be employed in any post according to their merit and virtues." It is further pointed out that on September 17, 1822, the Mexican Congress passed a preamble and act carrying into

effect the fundamental principles of the plan of Iguala in the following language:

"The sovereign Mexican Constitutional Congress, with a view to give due effect to the twelfth article of the plan of Iguala, as being one of those which form the social basis of the edifice of our independence, has determined to decree, and does decree: Article 1. That in any register and public and private documents, on entering the name of citizens of this empire, classification of them with regard to their origin shall be omitted."

The Supreme Court of the United States, in United States v. Ritchie, 17 How., 525, quoted in the Lucero case, gives the reason for these provisions conferring citizenship upon the Indians, without distinction of race, as follows:

"The Indian race having participated largely in the struggles resulting in the overthrow of the Spanish power and in the erection of an independent Government, it was natural that, in laying the foundations of the Government, the previous political and social distinction in favor of the European or Spanish blood should be abolished and the equality of rights and privileges established. Hence the article to this effect in the plan of Iguala and the decree of the first Congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the Government had the effect necessarily to invest the Indians with the privileges of citizenship as effec-
22 tually as had the Declaration of Independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time and who adhered to the interest of the colonies."

When New Mexico became a portion of the United States under the treaty of Guadalupe Hidalgo, in 1848, the guarantees of that treaty were to the effect that the citizens of New Mexico "can remain in New Mexico or remove to Mexico," and in either event their property rights are to be "inviolably respected." Recognizing the obligations imposed by the treaty, Congress, in the eighth section of the act of July 22, 1854 (10 Stat., 308), made it the duty of the surveyor general of New Mexico to "make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their title to the land * * *, which report shall be laid before Congress for such action thereon as may be deemed just and proper with a view to confirm bona fide grants and give full effect to the treaty of 1848 between the United States and Mexico." The Lucero opinion shows that under this direction of Congress the surveyor general examined and reported upon the titles of the pueblos of New Mexico, finding twenty-one pueblos in all, with a total population of about 8,000 souls. He recommended the titles of seventeen pueblos for confirmation as bona fide titles, among such being Santa Clara, the pueblo named in the present indictment, and Congress on

December 22, 1858 (11 Stat., 374), confirmed the titles as recommended, directing patents to issue, containing the following proviso:

"Provided, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

23 The public records show that patents issued in 1864 to most of these pueblos, including Santa Clara, covering what is known as the Indian league (being a league to each cardinal point from the church). Continuing its opinion the court says:

"This court has known the conduct and habits of these Indians for eighteen or twenty years, and we say, without the fear of successful contradiction, that you may pick out one thousand of the best Americans in New Mexico, and one thousand of the best Mexicans in New Mexico, and one thousand of the worst Pueblo Indians, and there will be found less—vastly less—murder, robbery, theft, or other crimes among the thousand of the worst Pueblo Indians than among the thousand of the best Mexicans or Americans in New Mexico. The associate justice now beside me, Hon. Joab Houghton, has been judge and lawyer in this Territory for over twenty years, and the chief justice for over seventeen years, and during all that time not twenty Pueblo Indians have been brought before the courts in all New Mexico accused of violation of the criminal laws of this Territory * * *. A law made for wild, wandering savages, to be extended over a people living for three centuries in fenced abodes and cultivating the soil for the maintenance of themselves and families, and giving an example of virtue, honesty, and industry to their more civilized neighbors, in this enlightened age of progress and proper understanding of the civil rights of man, is considered by this court as wholly inapplicable to the Pueblo Indians of New Mexico."

In the course of the opinion is found the following language:

"For centuries, the Pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. Since the introduction of the Spanish Catholic missionary into the country they have mainly been taught not only the Spanish language but the religion of the Christian church. In every pueblo is erected a church, dedicated to the worship of God, according to the form of the Roman Catholic Church, and in nearly all is to be found a priest of this church, who is recognized as their spiritual guide and adviser. They manufacture nearly all their blankets, clothing, agricultural and culinary implements, etc. Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, and their habits are similar to those of the people in whose midst they reside or in the midst of whom their pueblos

are situated. The criminal records of the courts of the Territory scarcely contain the name of a Pueblo Indian. In short, they
24 are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in features, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country and the equal of the most civilized thereof. This description of the Pueblo Indians, I think, will be deemed by all who know them as faithful and true in all respects. Such was their character at the time of the acquisition of New Mexico by the United States, and such is their character now."

It is further said:

"The plan of Iguala, adapted by the revolutionary government of Mexico, twenty-fourth February, 1821, declares, 'that all the inhabitants of New Spain, without distinction, whether European, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues,' and that 'the person and property of every citizen will be respected by the Government.' The treaty of Cordovia, twenty-fourth August, 1821, and the declaration of independence of twenty-eighth September, 1821, reaffirmed these principles, as subsequently did the first Mexican Congress, by two decrees, one adopted twenty-fourth of February, 1822, the other ninth of April, 1823. The first, 'the sovereign Congress declares the equality of civil rights to all the free inhabitants of the Empire, whatever may be their origin in the four quarters of the earth'; the other reaffirms the three guarantees of the plan of Iguala: (1) Independence; (2) the Catholic religion; and (3) union of all Mexicans of whatever race. By an act of September 17, 1822, to give effect to the plan of Iguala, it was provided that 'in the registration of citizens, classification of them with regard to their origin shall be omitted,' and that there shall be no distinction of class on the parochial books. Upon the subject of citizenship of Mexico of the Indian races, in the case in the Supreme Court of The United States v. Ritchie, Justice Nelson, who delivered the opinion of the court, says: 'These solemn declarations of the political power of the Government had the effect necessarily to invest the Indian with the privileges of citizenship as effectually as had the Declaration of Independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies.'"

Concluding its very full opinion the court says:

"That the Pueblo Indians were declared at that time 'Mexicans' and citizens; that they were recognized as such no one familiar with the history of the Mexican Government can question. That they are still recognized as citizens of the Republic of Mexico is evidenced by the fact that the present President of that Republic is a full-blood Pueblo Indian * * *. They, although still called Indians, have never, since the acquisition of this Territory, been subject to such

legislation as that authorized by the Constitution and found in the intercourse act of Congress. They should be treated, not as
25 under the privilege of the Government, but as citizens, not of a State or Territory, but of the United States of America."

The same subject was considered by the Supreme Court of New Mexico in 1874, in United States v. Santistevan, 1 N. M., 583, and in United States v. Joseph, 1 N. M., 593. Each of these cases involved the question of whether the Indians of the Pueblo of Taos were within the terms of the intercourse act, and in each instance it was held that they were not. In the Santistevan case, page 590, it is said:

"Those inhabitants of this territory, commonly known as the Pueblo Indians, were transferred with this territory by Mexico to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848, and, according to the terms of that treaty, have the same relations to the United States which they had to the Republic of Mexico, both as regards their persons and property, at the time of the treaty. These relations can only be modified, regulated, or changed by Congress in accordance with the terms of this treaty. Articles 8 and 9 of this treaty contain the guaranties entered into by the United States as to persons and property transferred by Mexico to the jurisdiction of the former, and by them are secured to all such persons the same rights of property as are enjoyed by all citizens of the United States, and to such persons as should not elect within the time specified in the treaty to retain the character of Mexican citizens admission 'to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution.' According to the decree dated at Iguala, February 24, 1821, section 12, these Pueblo Indians were made citizens of New Spain, which afterwards became the Republic of Mexico. This section reads thus: 'Todos los hábitantes de la Nueva Espana, sin distincion alguna de Europeos, Africanos ni Indios, son ciudadanos de esta monarquia, con opcion a todo empleo segun su merito y virtudes,' which is translated: 'All the inhabitants of New Spain, without any distinction of Europeans, Africans, or Indians, are citizens of this Monarchy, with eligibility to every office, according to their merits and virtues.' It might cursorily seem that the wild Indians are included in the term 'Indians' in this section, but such is not the fact, as by the usage of Mexicans the term hábitantes is limited to persons having a place of abode and does not embrace vagrants or nomads. The Pueblo Indians, however, had places of abode and consequently came within this section, and were made citizens by it. The thirteenth section of the same decree says: 'Las personas de todo ciudadanos y sus propiedades seran respetadas y protegidas por el gobierno,' which is in English: 'The persons and property of every citizen shall be respected and protected by the Government.' These quotations are from Galvani's collection of decrees, etc., of the Mexican Nation, and others of like effect may be made from the same work. The term propiedades in Mexican law
26 means property of all kinds, real, personal, and mixed. The quotations above made show that the Pueblo people, or town Indians, were considered citizens, and that as to persons and prop-

erties there was no distinction made on account of origin, race, or caste, and the same work shows that when the Mexican Nation changed their Monarchy of New Spain into the Republic of Mexico the status of these citizens, with regard to persons and property, was affirmed."

These cases went to the Supreme Court, and in United States v. Joseph, 94 U. S., 614, it is held, affirming the judgments below, that the Pueblo Indians of New Mexico hold complete title to their land, and are not Indian tribes within the meaning of the intercourse act of 1834. Quoting with approval certain expressions above reproduced from the Lucero case, the court says:

"When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the General Government.

"The Pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican Government, the full recognition by that Government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our Government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the Governments, State and National, deal, with a few exceptions only, in their national or tribal character, and not as individuals.

"If the Pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and can not for that reason be classed with the Indian tribes of whom we have been speaking."

Considering the title under which these Indians held their
27 land, the court proceeds:

"We find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the Government.

"It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe.

"The Pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the Government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican Government, and protected by it in the treaty of Guadaloupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States.

"With the purpose of carrying into effect this provision of that treaty, Congress directed the surveyor general of New Mexico to make inquiry into all grants of the Spanish and Mexican Governments, and to report to that body on their validity. Such reports were made from time to time, one of which included and recommended for confirmation this claim of 'the Pueblo of Taos, in the county of Taos,' not the Pueblo Indians of Taos, but the Pueblo of Taos; and by an act of Congress of Dec. 22, 1858, 11 Stat., 374, the title was confirmed, and the Commissioner of the Land Office ordered to 'issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor general, and cause a patent to issue therefor, as in ordinary cases to private individuals: Provided, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist.

"It is unnecessary to waste words to prove that this was a recognition of the title previously held by these people, and a disclaimer by the Government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right."

The status of the Pueblo Indians was a matter of further consideration by the Supreme Court of New Mexico in the Pueblo Indian Tax Case, 12 N. M., 139. There the court held the lands of these Indians to be subject to taxation. Citing the cases above referred to, it is pointed out that the Spanish conquerors
28 "found them a peaceful, industrious, and civilized people, living in towns (pueblos) and following agricultural and pastoral pursuits." Nevertheless, it is said, "they seemed to have been considered by the Spanish as wards of the Government and entitled to special privileges and protection," so that while the Spanish Crown as early as 1689 granted them certain lands "certain restrictions were placed upon the alienation of their property." The court proceeding says:

"But a complete change took place in the status of these people when Mexico threw off the Spanish yoke. Among those engaged in that struggle for independence, this Aztec race far outnumbered the Mexicans and its success was due in a large measure to their efforts. It was but natural and fitting that in the formation of the new

government they should take a prominent if not a leading part, and that they should be placed upon an equal footing as to all civil and political rights."

The court, in support of its conclusion that the Pueblos were Mexican citizens, refers to the plan of Iguala and the legislation of that period passed by Mexican authority (much of which has been above referred to), and says as to their present status:

"It is a matter of history, gathered by the writer from conversations with early residents of the country, that these people were, after the treaty of Guadalupe Hidalgo and down to the organization of the Territory, and perhaps down to the act of 1854, supra, regarded by the people as citizens, and as possessed of all the rights of the same. They are reported to have participated in elections, and held office in Pena Blanca and other places in the Territory. They sat as grand and petit jurors in this same county of Bernalillo, while Judge H. S. Johnson presided over the same, at one term of court at least. It is reported that through the efforts of one John Ward, an agent appointed for them, there was a tacit agreement reached between them and the people of the counties where they resided, that as long as they refrained from voting they should not be taxed. They thus drifted out of the political life of the Territory. But no such agreement, if made, was of any binding force, either upon the Indians or the Territory.

"We conclude, therefore, that the Pueblo Indians of New Mexico are citizens of New Mexico and of the United States, hold their lands with full power of alienation, and are, as such, subject to taxation."

29 In 1907 the Supreme Court of New Mexico again considered the subject in United States v. Mares, 14 N. M., 1. There, as we have said above, the question was directly presented as to whether a prosecution would lie under the act of January 30, 1897, for the sale of intoxicating liquor to a Pueblo Indian. In holding that such prosecution would not lie the court says:

"The status of the Pueblo Indians of this Territory has been subject to very full consideration by this court and by the Supreme Court of the United States in a number of cases. United States v. Varela, 1 N. M., 593; U. S. v. Santistevan, 1 N. M., 583; Pueblo Indian Tax Case, 12 N. M., 139; United States v. Joseph, 94 U. S., 619; quoted in ex parte Crow Dog, 109 U. S., 572; U. S. v. Ritchie, 17 How., 525, 538. From these decisions the first two of which dealt with the very Pueblo here in question, their legal standing has been very definitely fixed. They have been judicially determined to be a people very different from the nomadic Apaches, Comanches, and other tribes 'whose incapacity for self-government required both for themselves and for the citizens of the country the guardian care of the General Government.' They are not tribes within the meaning of the Federal intercourse acts prohibited settlement upon the land of 'any Indian tribe.' They are not wards of the Government in the sense that this term has been used in connection with the American

Indian. While Congress has as a mere gratuity from time to time provided agents and special attorneys for them, it has never attempted thereby to reduce them to a state of tutelage or to put either them or their property under the charge or control of the Government or its agents. On the contrary, they hold their lands and property by complete and perfect title antedating the sovereignty of the United States and recognized by its unconditional patents issued to them decades ago. They have full power to alienate their lands, and these, in the absence of any act of Congress to the contrary, are subject like other property to taxation by the Territory. Finally, these Indians were, at the date of the treaty of Guadalupe Hidalgo, citizens of Mexico and of the United States.

"This being the status of the Pueblo Indians, as fixed by the decisions of this court and of the Supreme Court of the United States, it only remains to be determined whether the sale of intoxicating liquors to them is within the prohibition of the act of January 30, 1897 (29 Stat., 506; 3 Fed. St. Ann., 384). That act makes it penal to sell or give intoxicants to 'any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under the charge of any Indian superintendent or agent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship.' It is a sufficient answer to the present appeal to say that in our judgment the Pueblo Indians, as defined by the decisions above referred to, do not come within any of the three classes above referred to. The title to their lands is not held in trust by the Government; they are not wards of the Government, nor are they under the charge of any Indian superintendent or agent; they are not Indians over whom the Government, through its departments, exercises guardianship."

It thus being clear, in the light of the history of the Pueblos, that independent of the enabling act the sale of liquor to Pueblo Indians is not within the legislation of Congress, what effect in the light of that history have the provisions of the enabling act above quoted? For the Government it is urged that the stipulations of the enabling act and of the State constitution that Pueblo lands shall constitute Indian country and shall be subject to the exclusive jurisdiction of the United States, is valid upon the following reasons: That Congress is vested with plenary power to legislate as to the Territories and, therefore, has the constitutional right to segregate, in forming a new State, such areas as it sees fit, and to assume entire control of these latter in so far as this does not take from the owners of the land the right to possess and enjoy it as citizens of the United States; and that in making this provision as to Pueblo Indians lands it has acted within such claim of constitutional powers. On the other hand it is said by the defendant that restraint upon the sale of intoxicants is an exercise of the police power; that upon the creation of a new State the exercise of this power becomes one for the new sovereignty and

can not, save under exceptional circumstances, be reserved by the General Government, and that no such reservation can be made, as is here asserted, as to a people who are citizens, not wards, and as to lands held not by governmental permission, contract, or
31 sufferance, but by fee simple title long antedating American sovereignty. It is further urged that New Mexico in entering the Union entered upon an equality with other States, and that it was and would be imposing an unwarranted condition, detracting from that equality to say that a portion of the private property of the citizens of the State shall indefinitely, perhaps forever, be withheld from the police power of the new sovereignty.

The argument for the defense impresses me as serious, and upon careful consideration as persuasive, and leads to the decision that the demurrer must be sustained. To hold otherwise is to disregard not only what impress me as well-defined principles, but also what constitute controlling precedents.

Among the constitutional powers confided to Congress is that of creating new States from its territory. This, however, is to be exercised in a manner consistent with our form of government. The latter contemplates a union of equal States. Conditions may not be imposed upon admission that detract from this equality, save only where the provisions of the Constitution permit such conditions. When this latter situation is present the conditions can not accurately be said to interfere with this equality, since they derive their permissibility from a source as high as the principle of equality itself, to wit, the Constitution. Prima facie the withholding of a purely police power exercised by all the other States is void, since it has the effect to that extent to admit the State with less power over its people and over areas within its boundaries than is enjoyed by
32 other States. As illustrative of the matter, suppose that Congress in admitting a State should reserve to itself the power to punish for all larceny committed upon lands owned by American citizens of German ancestry, or suppose it should reserve to itself the power to punish for all assaults committed within lands owned by American citizens of Italian birth. In each instance, of course, the regulation of the crime is a matter for the police power. Equally clear is it that to carve out of the police power of the State either of these matters would be to leave for delivery to the State only an incomplete sovereignty. A court in dealing with such a matter would hardly hesitate to hold that such reservation would be void, and as to the propriety of such a conclusion there would scarcely be a difference of opinion. The distinction pressed upon us between what has just been suggested and the situation here involved is, however, that the land now sought to be reserved from the police power belongs to Indians, and may within the constitutional powers be created and perpetuated as Indian country, subject to Federal control. In other words, it is said that because an Indian is involved constitutional power existed in Congress to place upon the State the condition that what was previously not Indian country must henceforth be deemed

such as a condition to admission. But from what constitutional source proceeds the power of Congress to legislate as to the Indians? The origin of this power is suggested by District Judge Marshall in United States v. Boss, 160 Fed., 132, when in referring to the liquor statute of January 30, 1897, he says: "If it is to apply within a State it must be because of the status of the Indians for whose protection it was enacted, or of the locus of the forbidden act as being on a reservation."

33 The matter is more fully stated by the Eighth Circuit Court of Appeals, speaking through Circuit Judge Smith, in United States Express Co. v. Friedman, 191 Fed., 673. That case likewise deals with the matter of the Indian liquor traffic, and classifies congressional power to legislate as to the Indians as flowing from one of five sources: First, the treaty making power; second, the power to regulate interstate commerce; third, the power to regulate commerce with Indian tribes; fourth, the ownership as sovereign of lands to which the Indian title has not been extinguished; fifth, the plenary authority arising out of the Nation's guardianship of the Indians as an alien but dependent people.

Applying these in succession to the present situation, the power to legislate in the manner here involved cannot be attributed to the treaty making power. The Pueblo Indians of New Mexico have never been parties to any treaty with the United States, nor has it ever been claimed that they were proper subjects for a treaty. Neither can this power exist as a result of the right to regulate interstate commerce. The stipulation of the enabling act applies indifferently to the introduction of intoxicants from within or without State lines, and it is not pretended that in the present case the liquor introduced was introduced from without the State of New Mexico. The power here asserted cannot be sustained as an exercise of the right to regulate commerce with Indian tribes. As we have seen, the Pueblo Indians are not tribes within the meaning of the Constitution. It cannot be upheld as a result of Federal ownership of lands to which the Indian title has not been extinguished, for, as we have seen, the

34 American Government never owned the lands in question. Nor can it flow from what the Circuit Court of Appeals has called "the plenary authority arising out of its guardianship of the Indians as an alien but dependent people." The Pueblos have never been wards of the Nation. As we have seen, they occupied to some extent that position under the Spanish régime, but beginning with the independence of the Mexican Nation in 1821 they became citizens, and when New Mexico became a part of our national domain they came under our sovereignty as citizens and not as wards. No act of theirs nor of our Government since the treaty of Guadalupe Hidalgo has changed their status so as to subject them to national guardianship or to make them an alien and dependent people. True, as pointed out in United States v. Lucero, supra, Congress in 1854 appropriated $10,000 to make them presents of agricultural implements and farm-

ing utensils (10 Stat., 330). True, in 1857 Congress appropriated $3,750 for "expenses of surveying and marking the external boundaries of the Indian pueblos in the Territory of New Mexico" (11 Stat., 184). True, an attorney has of late years been provided for them at the expense of the Government (35 Stat., 799). True, also, Congress after the decision in the Pueblo Indian tax case, above-mentioned, relieved them from the payment of any taxes to the Territory of New Mexico (33 Stat., 1069). But these acts fall far short of establishing a resumption of guardianship over the Pueblos. On the contrary, they are rather to be deemed gratuities proceeding from a generous Government to a poor but deserving portion of our population. The appropriations referred to in the first three instances
35 were by Congress in the exercise of its constitutional power to appropriate the public moneys, the last in the exercise of its power to legislate for the Territories. Congress could with equal power have passed these acts in the interest of citizens not Indians, and the mere fact that they were Indians does not result in placing them in a condition of tutilage.

We have therefore left as the sole basis upon which Federal jurisdiction may be retained over these people the fact that they are of Indian lineage. Is this enough? There is, from a governmental standpoint, no magic in the word Indian. It has through the course of our legislation indicated a condition no less than a race. With the condition gone by the assimilation of the person into the body politic and the release of his lands from governmental control by the issuance of unconditional patents his race loses significance. If the mere fact that he be an Indian is of itself sufficient to justify his being held always subject to a species of Federal police power, that power would seem likewise logically to extend to his remote posterity, for they, like him, have Indian blood in their veins calling for the national guardianship. The length to which this would go will be appreciated when we recall that high State officials and leading Members of Congress have been of Indian race. Can it be that to sell to such citizens or to deliver at the home of such a citizen an intoxicant is a matter of Federal concern? The question carries its own answer, and yet this is precisely what is claimed when it is asserted that to sell intoxicants to a Pueblo Indian citizen upon his own farm shall, so long as he, an Indian, owns it, be a matter to be regulated purely by Congress. Such, in my judgment, is a
36 claim of power for Congress that it does not possess. More than this, it is a detraction from the police power properly belonging to the State, and if upheld has the effect to admit New Mexico shorn of powers possessed by every other State in the Union. It cannot, therefore, be sustained.

Coming to authority, two decisions of the Supreme Court seem peculiarly in point upon this question. Matter of Heff, 197 U. S., 488, and Coyle v. Oklahoma, 221 U. S., 559. In the Heff case there was a conviction for selling beer to a member of the Kickapoo Tribe of Indians in Kansas. The facts showed that the party to whom

the liquor was sold was a citizen of the United States and of the State of Kansas, and by reason of having received an allotment of land in severalty he was by law declared to be subject to the laws, both civil and criminal, of the State in which he resided. In deciding that under the circumstances a conviction for the sale of liquor to such an Indian under the act of Congress of January 30, 1897, could not be sustained, the court says:

"In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of State jurisdiction. It is true the National Government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue and is no atempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a State whose laws forbid its sale, and neither does a license from a State to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the Federal statute. License Cases, 5 How., 504; McGuire v. The Commonwealth, 3 Wall., 387; License Tax Cases, 5 Wall., 462. Now, the act of 1897 is not a revenue statute, but
37 plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation and not divided between the two."

It is further said:

"But it is contended that although the United States may not punish under the police power the sale of liquor within a State by one citizen to another it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of section 8, Art. 1, of the Constitution, which empowers Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress having power to regulate commerce between the white men and the Indians continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State and shall be a citizen of

the United States, and therefore a citizen of the State. But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of National and therefore State citizenship, the benefits and burdens of the laws of the State may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian blood in his veins, he is to be forever one of a special class over whom the General Government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

The court concludes as follows:

"But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

38 While it may be, as suggested in United States Express Co. v. Friedman, 191 U. S., 673–680, supra, and Mosier v. United States (decided April 22, 1912, by the Eighth Circuit Court of Appeals) that the scope of the Heff case has been narrowed by later cases, the decision has not been detracted from upon the point here material, and has indeed been strengthened in principle by the later case of Keller v. United States, 213 U. S., 147. See also Ward v. Race Horse, 163 U. S., 504, and cases cited.

In Coyle v. Oklahoma the question was as to the efficacy of the Oklahoma enabling act of June 16, 1906, to prevent the removal of the capitol by act of the State legislature. The enabling act had stipulated that it should remain at Guthrie until 1913. The constitutional convention by ordinance declared irrevocable had accepted this as a condition of admission. But the Supreme Court held the enabling act to be void and the stipulation ineffectual. In dealing with the matter the court classifies the conditions which Congress has exercised the power to impose in admitting States as follows:

"We must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject; and, third, com-

pacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of State power."

The court proceeds:

"The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the State after its admission, which overrides any subsequent State legislation repugnant thereto.

"The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly State powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this:
39 Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate at the time of its admission? The argument is, that while Congress may not deprive a State of any power which it possesses, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent at least of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union, and the constitutional duty of guaranteeing to 'every State in this Union a republican form of government.' The position of counsel for the appellants is substantially this: That the power of Congress to admit new States and to determine whether or not its fundamental law is republican in form are political powers, and as such uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon 'an equal footing with the original States.'"

It is then further said:

"But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit States * * *.

"This Union was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by

its own legislation admitting them into the Union; and second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission."

The court further says:

"It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Williamette Bridge Co. v. Hatch, 125 U. S., 1, 9. Pollard's Lessee v. Hagan, supra.

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. If power to impose such a restriction upon the general and undelegated power of a State be conceded as implied from the power to admit a new State, where is the line to be drawn against restrictions imposed upon new States?"

The court concludes in the following language:

"Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she can not."

In Texas v. White, 7 Wall., 700, 725, Chief Justice Chase said in strong and memorable language that "the Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States."

In Lane County v. Oregon, 7 Wall., 76, he said:

"The people of the United States constitute one nation, under one government, and this Government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

"To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

If in the Oklahoma case the constitutional equality of a new State was invaded by a provision seeking to control for a limited time the location of its capital, it seemn equally clear that that constitutional equality is interfered with in the case of New Mexico by the declaration that land held by its citizens under perfect title from a former sovereignty shall indefinitely constitute Indian country and be
41 thus subject to Federal control to the exclusion of the police powers of the State. The possession of the police power is as essential to the full sovereignty of the State as the possession of the power to fix its seat of government.

Counsel for the Government have cited a large number of cases, some of them quite recent, in which the courts have upheld the applicability of Federal legislation as to Indians within the limits of a State. It is believed, however, that an examination of these cases will show that the Federal power in any instance sustained was fairly referable to one or the other of the constitutional sources mentioned in the Friedman case, supra, none of which are applicable here. Perhaps the case most nearly approximating the present one upon the facts is Dick v. United States, 208 U. S., 340. There the Supreme Court, reversing the lower courts which had held that the prosecution would not lie (Ex parte Dick, 141 Fed., 5), decided that a prosecution under the liquor act of January 30, 1897, was sustainable, although the land upon which the liquor was introduced was owned in fee by citizens of such State. The court bases its decision upon the fact that the land in question was once property of the Indian tribe and had been acquired by the United States subject to the condition that the acts of Congress relating to the introduction of liquor should remain in force over such territory for the limited period of 25 years, which period had not expired. The court says:

"In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and com-
42 plete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian

tribes Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State can not be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes."

The power of Congress in the matter was as the court expressly says (page 359): "Based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians and was not inconsistent in any substantial sense with the constitutional principle that a new State comes into the Union upon entire equality with the original States." The court, however, in the course of the opinion is careful to say:

"If this case depended alone upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which at the time the Indian title had been extinguished and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of government, was full and complete. Bates v. Clark, 95 U. S., 204; Ex parte Crow Dog, 109 U. S., 556, 561."

The recent case of Clairmont v. United States (decided June 10, 1912, by the Supreme Court of the United States) refers to the Dick case and points out the source of the Federal power there upheld. Of the other cases cited for the Government, the Federal power was in some instances sustained as flowing from treaty. The Kansas Indians, 5 Wall., 737; United States v. Forty Three Gallons of Whiskey, 93 U. S., 188. In still other cases cited the jurisdic-
43 tion was upheld under the power of Congress to regulate commerce between the States or with Indian tribes. United States v. Holliday, 3 Wall., 409; United States Express Company v. Friedman, 191 Fed., 673; Ex parte Charley Webb (Supreme Court of the United States, decided June 10, 1912). In still other cases the jurisdiction was sustained upon the power flowing from the Government's right to administer its own property, as, for instance, in cases arising upon a reservation or those in which the Government held title in trust, or those in which although title had passed to the Indians there was an express prohibition against alienation for a certain period. United States v. Farrell, 110 Fed., 149; United States v. Allen, 179 Fed., 13; Bowling v. United States, 191 Fed., 19; United States v. Celestine, 215 U. S., 278; United States v. Sutton, 215 U. S., 291, 295; Tiger v. Western Investment Co., 221 U. S., 286; Hallowell v. United States, 221 U. S., 323; Clairmont v. United States, supra, decided by the Supreme Court on June 10, 1912, illustrates the converse of the question, being a case in which the Indian title had without reservation been extinguished. The case of Mosier v. United States, supra (Eighth Circuit Court of Appeals, April 22, 1912), is perhaps an illustration of the power resulting from the national guardianship of the Indian as a dependent person. None of these

cases in my opinion are applicable to the Pueblo Indians of New Mexico.

It is not overlooked in making the present disposition of the case that it is one of great importance to the Indians in question, and that the effect of the decision may be to break down a safeguard which Congress and the framers of the New Mexico constitution have attempted to provide for the Pueblo Indians. However, mere desirability of a result can furnish as against constitution limitation
44 no justification for an assumption of Federal power nor for a denial of State jurisdiction. The matter being purely one for the State, it will be assumed, as in Ex parte Dick, 141 Fed., 5, that the legislature of the State will perform its duty in this respect. If, as suggested at the bar, State legislation already passed on the subject is fully adequate, it is to be anticipated that the State courts, by the enforcement of such statutes, will afford the Pueblo Indians the protection which Congress and the State constitutional convention have indicated a desire to give them. To assume otherwise is to say that representative government is a failure.

A judgment sustaining the demurrer and dismissing the proceedings will be entered.

This July 23, 1912.

WM. H. POPE,
U. S. District Judge.

(Endorsed:) Filed July 23rd, 1912. Harry F. Lee, clerk.

45 *The United States of America.*

UNITED STATES DISTRICT COURT,
District of New Mexico, ss:

I, Harry F. Lee, clerk of the United States District Court for the District of New Mexico, do hereby certify that the above and foregoing constitutes a full, true, and correct transcript of so much of the record in the cause therein entitled, as requested by plaintiff in error, or by defendant in error, as the same remains on file and of record in said cause.

I do further certify that the original writ of error and the clerk's return thereon and the original citation with the acceptance of service endorsed thereon, are also hereto attached and herewith returned as a part of the transcript of this record.

Witness my hand and the seal of the United States District Court for the District of New Mexico, this 21st day September, A. D. 1912.

[SEAL.] HENRY F. LEE,
Clerk.

(Indorsed on cover:) File No. 23,373. New Mexico, D. C. U. S. Term No. 798. The United States of America, plaintiff in error vs. Felipe Sandoval. Filed September 30, 1912. File No. 23,373.

○

14

No. ~~799~~. 352

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, *Plaintiff in Error,*

v.

FELIPE SANDOVAL, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case (as it it here under the Criminal Appeals Act) be advanced for early hearing.

Sandoval was indicted for introducing intoxicating liquor into Indian country; that is, the Santa Clara Pueblo, N. Mex.

The locus of the offense is land now belonging to the Pueblo Indians and to which they acquired title from Spain while New Mexico was under Spanish sovereignty, and the land is such as is designated Indian country in the constitution of the State of New Mexico. The question raised by the demurrer, which

70608—12

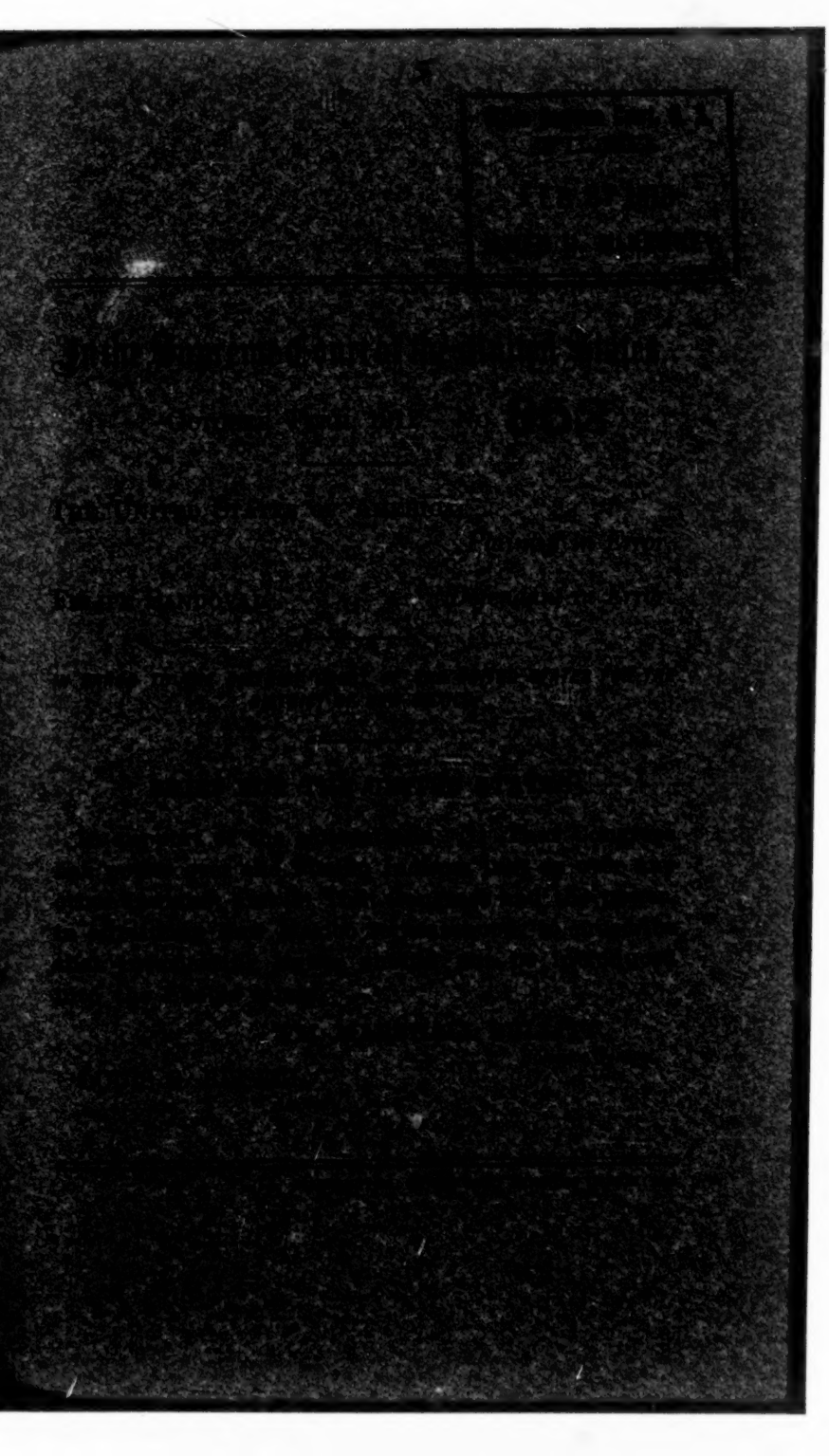
was sustained, is whether this land is Indian country within the meaning of the act of January 30, 1897, 29 Stat. 506, which forbids the introduction of liquor into the Indian country in general; and, if not, whether the provisions of the New Mexico Enabling Act, 36 Stat. 557 (which required ordinances in the State constitution designating this Pueblo Indian land as Indian country, forbidding the introduction of liquor thereon, and leaving it subject to the jurisdiction of the United States), were within the power of Congress to impose.

Notice of this motion has been given opposing counsel.

WM. MARSHALL BULLITT,
Solicitor General.

DECEMBER 23, 1912.

○



INDEX.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 798.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

FELIPE SANDOVAL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

BRIEF FOR THE UNITED STATES.

Felipe Sandoval was indicted in the District Court for introducing intoxicating liquor into the Indian country, to wit, the Santa Clara Pueblo in the district of New Mexico. (Rec., 4.)

A demurrer was sustained to the indictment and for the purposes of the demurrer, the following facts were agreed (Rec., 6):

1. That the Pueblo Indians of Santa Clara are Pueblo Indians of New Mexico.

2. That the lands of the said Pueblo Indians of Santa Clara, known as the Pueblo grant of Santa Clara, were owned and occupied by them upon the

20th day of June, 1910, and at the time of the admission of New Mexico as a State, and are such lands as are designated Indian country in section 8 of Article XXI of the constitution of the State of New Mexico.

3. That said Indians acquired right and title to and ownership, in fee simple, of said grant through a prior sovereignty, to wit, the Kingdom of Spain.

4. That as to the locus of the offense sought to be charged in the indictment in said case, the title of the said Indians has not been extinguished.

5. That this stipulation shall be deemed to have been filed nunc pro tunc as of the date of the argument upon the demurrer and shall be deemed and considered as part of any record upon appeal in event a writ of error shall be sued out without the necessity of the court signing and settling the same as a bill of exceptions.

The United States sued out a writ of error (Rec., 7–9).

ASSIGNMENTS OF ERROR.

The errors assigned reduce substantially to two (Rec., 8–9):

That the District Court erred—

1. In declaring invalid the provisions of the enabling act for New Mexico, which constituted the Pueblo Indian lands in that State "Indian country."

2. In declaring inapplicable to such lands the act of 1897 prohibiting the introduction of liquor into "Indian country."

Statutes Involved.

Section 2139, Revised Statutes, relative to the liquor traffic with the Indians and in Indian country, as amended by the act of January 30, 1897 (29 Stat., 506), provides as follows:

> That *any person* who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person *who shall introduce* or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or *intoxicating liquor of any kind* whatsoever into the *Indian country*, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars

> for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into *the Indian country* that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

The Pueblo Indian lands in New Mexico were expressly constituted *Indian country* by the Enabling Act for that State and the State constitution as follows (36 Stat., 558, 560):

> SEC. 2. That the delegates to the convention * * * shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed State, all in the manner and under the conditions contained in this Act. * * *
>
> And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—
>
> First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating

liquors to Indians and *the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.*

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands or other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or

confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe * * *.

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to all the laws of the United States prohibiting the introduction of liquor into the Indian country; *and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.*

These conditions were duly accepted by the constitutional convention representative of the people of the proposed State of New Mexico, and were embodied in the form of an irrevocable ordinance, as required, in Article XXI of the constitution of the State (adopted November, 1910, and ratified at an election January 21, 1911).

Furthermore, by virtue of the Enabling Act, the constitution of the State and the earlier Organic Act for the Territory of New Mexico the Indians are not permitted to vote except at certain minor and local elections (36 Stat., 558, sec. 1; 9 Stat., 448, secs. 5–6; Compiled Statutes of New Mexico (1897), sec. 1678).

ARGUMENT.

This whole case turns upon the *power* of Congress to constitute the Pueblo Indian lands *Indian country* for the purposes of the Indian liquor traffic statutes.

Congress certainly intended to do so, and used apt words to effectuate such intention, if it had the constitutional power to do so.

The act of 1897, *supra*, applies in terms to *Indian country;* and the compact between the United States and the State of New Mexico contained in Article XXI of the State constitution provides that the Pueblo lands in that State shall constitute *Indian country*.

Our opponents deny the power of Congress to constitute the Pueblo lands Indian country, or to require the State of New Mexico to recognize them as such, on the ground that New Mexico's equality of footing with other States is thereby violated and impaired.

FIRST POINT.

Congress had the power, in admitting New Mexico to Statehood, to impose conditions relative to the Pueblo Indians within its borders.

Restrictions upon the future authority of proposed States over persons and property within their geographical limits, imposed in the form of conditions or compacts in their enabling acts are valid, if, in effect, they are only pieces of affirmative legislation enacted by Congress pursuant to one of the powers vested in the Federal Government, other than the

power to admit new States. (*Coyle* v. *Oklahoma*, 221 U. S., 559.) Since Congress in the exercise of these powers may ignore State lines, such legislation would be valid *after* statehood had been granted; and *à fortiari* may therefore be enacted *before* statehood in the form of a condition in an enabling act.

The power which the National Government possesses over the Indians and their affairs is of this character (*Coyle* v. *Oklahoma, supra; Ex parte Webb*, 225 U. S. 663; *United States* v. *43 gallons of whiskey*, 93 U. S., 188), and the requirement in the case of New Mexico that the pueblo lands within the State should constitute Indian country was an *inter vires* exercise of it.

These conditions Congress imposed on New Mexico.

(1) That the sale of intoxicating liquor to Pueblo Indians should be prohibited.

(2) That the introduction of liquor upon their lands should also be prohibited.

(3) That their lands should be exempt from State taxation until Congress should otherwise provide.

All three of these requirements have been expressly recognized by this court as within the constitutional power of Congress over the Indians subject to its jurisdiction.

(1) In *United States* v. *Holliday*, 3 Wall., 407, the defendant was indicted for selling liquor to an Indian under the charge of an Indian superintendent or agent within the limits of a State and off of the Indian reservation. The indictment was sustained on the ground that the act of Congress prohibiting

the sale of liquor to an Indian over whom the Federal Government had not relinquished its jurisdiction was valid, and that the status of the Indian, rather than jurisdiction over the place where the sale occurred, was the determining factor in favor of Federal jurisdiction.

(2) In *United States* v. *43 gallons of whiskey*, 93 U. S., 188, a seizure of goods as a penalty for introducing liquor into the Indian country contrary to the provisions of an act of Congress was upheld, although the title to the land upon which the introduction was made was neither in the Indian nor in the United States. The *locus in quo* was contiguous to an Indian reservation, and the relinquishment by the Indians of their title to it by cession to the United States had been accompanied by an agreement that the land ceded should for a definite period remain subject to the Federal laws prohibiting the introduction of liquor into the Indian country. The power of Congress to forbid the introduction of liquor upon land so situated with reference to Indians over whom the Federal Government had retained its jurisdiction where necessary to protect the Indian was expressly declared.

The decision in *United States* v. *Dick*, 208 U. S., 340, is to the same effect.

But if Congress has the power to restrict private lands situated within the geographical limits of the State in the interest of its Indian wards, much more has it the power to impose such restrictions upon the lands to which the Indians themselves hold title.

(3) Congress also has the power upon the creation of new States, to withhold Indian lands from the jurisdiction of the State, and to impose upon the State the requirement that they shall be exempt from taxation. (*The Kansas Indians*, 5 Wall., 737; *United States* v. *Rickert*, 188 U. S., 432; *Choate* v. *Trapp*, 224 U. S., 665.)

The only question in the present case, therefore, is whether the Pueblo Indians were within the constitutional power of Congress over Indians, and if so whether that jurisdiction had ever been disavowed or surrendered.

SECOND POINT.

The Pueblo Indians of New Mexico are "Indians" and, therefore, are subject to the constitutional power of Congress over Indians.

The Government takes the position:

First, that the jurisdiction over Indians vested in the Federal Government under the Constitution is intrinsically sufficiently broad and comprehensive to embrace Pueblo Indians, and that they are subject to the control of the United States as wards, just as any other Indians of the West are unless the Government has renounced, disavowed, or relinquished it.

Second, that this jurisdiction attached the moment the territory ceded by Mexico under the treaty of 1848 (9 Stat., 922) was incorporated into the United States for the reason that it was not at that time disclaimed either expressly or by necessary implication; and,

Third, that it has not subsequently been relinquished.

The presumption is strong in favor of the original existence of Federal jurisdiction over all Indians and against its subsequent voluntary relinquishment. The surrender of authority and control over the Indian which resides in the United States is not lightly to be presumed; and positive and unmistakable evidence is required to establish it. (*United States* v. *Celestine*, 215 U. S., 278; *Hallowell* v. *United States*, 221 U. S., 317.)

Our opponents urge that the Pueblo Indians are not "Indians" in the sense in which that term is used in the Constitution, because—

(1) Their unit or form of social and political organization is the pueblo and not the nomadic horde or ethnic tribe.

(2) They are a peaceful, sedentary, agricultural people, of a somewhat higher type of civilization than is ordinarily encountered among Indians.

(3) They were citizens of the Mexican Republic (*United States* v. *Richie*, 17 How., 525).

(4) Many Pueblos, among them the Santa Clara Pueblo now in controversy, own their lands in fee simple, albeit in common, under grants from Spain, confirmed by the United States. (10 Stats., 308; 11 Stats., 374; *Joseph* v. *United States*, 94 U. S., 614.)

We shall discuss these factors in the order in which they are stated with a view to showing that none of them is sufficient to rebut the presumption of Federal jurisdiction.

(1) The effect of organization in villages.

The mere fact that the social and political structure of the Pueblo Indians differed from that of most Indians did not except them from the category of Indians over whom authority and jurisdiction is constitutionally vested in the National Government.

As derived from the commerce clause of the Constitution, Federal jurisdiction is defined in terms of "Indian *tribes*," and the point is made that the Pueblos are not *tribal* Indians.

This grant of power must not be narrowly interpreted; and the words "Indian tribes" must not be taken in a narrow or inelastic sense nor as indicative merely of a single type of social or political organization native to the Indian.

The words "Indian tribes" refer to and include all types and forms of Indian communities living as communities, in accordance with Indian traditions, customs, usages, and rites; and signify Indians living a distinctly Indian life, as a distinct and segregated people, under some kind of organization and political structure and in some measure autonomous.

The framers of the Constitution never intended any distinctions between different forms of organization. Their real intention, and the purpose of the definition of power conferred upon the Federal Government in terms of "Indian tribes," was to distinguish between the fact of organization in some form and the utter lack of it. At that time many of the Indians previously encountered had "extinguished

their national fires" and had abandoned a distinctly Indian life and had virtually become a part of the population of the Commonwealths in which they dwelt. Over such Indians the several Commonwealths claimed jurisdiction and sovereignty, and it was a mooted question whether they ought reasonably to be included within the power which should be conferred upon the central government. It was this difficulty and the determination of this question which the adoption of the words "Indian tribes" in the commerce clause resolved, and the obvious purpose of the word "tribes" was to exclude from Federal jurisdiction Indians of the kind described. This is amply demonstrated by the history of the clause.

Article IX, Par. 4 of the Articles of Confederation had provided (although its precise meaning was never determined; 2 Story, Constitution (1873), §§ 1097–8) as follows:

> The United States in Congress assembled shall also have the sole and exclusive right and power of * * * regulating the trade and managing all affairs with *the Indians*, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

And following are the successive forms in which the grant of jurisdiction over the Indians to the Federal Government was proposed in the convention which framed the Constitution:

> The Legislature of the United States shall have the exclusive power * * * of regu-

> lating *Indian affairs* * * * (2 Farrand, Records of the Federal Convention, pp. 158–9).
>
> To regulate affairs with *the Indians* as well within as without the limits of the United States (Ib., 321; 324).
>
> To regulate commerce with * * * and with *Indians* within the limits of any State, not subject to the laws thereof (Ib., 367).
>
> To regulate commerce with * * * and with the *Indian tribes.* (Ib. 493.)

In the cases which have come before this court on the question of a conflict of authority between the State and Federal jurisdiction over the Indians frequent references are encountered to the continuance of the tribal relation and its recognition by the political branch of the national government, as the decisive factor in favor of its jurisdiction. But these cases merely mean that Federal jurisdiction, once it has attached, continues as long as the status of the Indians upon which it rests is recognized by Congress and that it is not lost except by affirmative relinquishment. They do not decide that a particular form of political organization *is necessary in the first instance* to the existence of jurisdiction, and much less do they pronounce the particular form deemed essential to it.

Under this more liberal reading of the terms, the Pueblo Indians are plainly "Indian tribes" within the meaning of the Constitution.

They have always had a distinctive form of self-government, and in spite of their subjection to other sovereignties, were in large measure autonomous.

Their governmental machinery consisted of a permanent council and an elective executive system, while a complex and esoteric religious organization dominated their whole life. (*Papers, Archæological Institute of America*, Am. Ser. 3–4 (1890–2); *Report of Bandelier*, Part 1, pp. 130, 201, 206, 275–6; *Twenty-third Report, Bureau of American Ethnology* (1901–2), Stevenson, p. 289.)

In an ethnical sense moreover they were tribal Indians, and "pueblo society was tribal society in its full meaning." (*Bandelier, supra*, pp. 50, 118, *passim*, 139–40.) Under the Spanish régime they remained practically self-governing (*Bandelier*, p. 198), and the result of the establishment of the Mexican Republic upon them has been described as follows (*Bandelier*, p. 228):

> During the Mexican Republic matters grew worse, for the Indian traits of segregation and tribal strife displayed themselves as soon as the bond of unity imposed by Spain was forcibly removed.

Although the Pueblos have ever accorded ready recognition and acknowledgment to the laws of the sovereignty to which they have been subject in all matters touching their relations with strangers and outsiders, they have ever persistently and steadfastly sought to settle all purely internal affairs for themselves. (*Bandelier*, p. 206.) This, indeed, may account for the assertion quoted in the opinion of the court below that few of these Indians have appeared in the territorial courts.

Surely it can not be affirmed of Indians organized in village communities (aside from the additional factors of citizenship and land tenure to be considered later) that their circumstances are so radically different from those of the more frequently encountered Indian, and so utterly repugnant to the meaning of the words "Indian tribes" and to the inclusion of the Pueblo Indians within the authority conferred upon the United States, that if their existence had been suggested to the framers of the Constitution they would have been expressly excluded from Federal control. And in the absence of such positive assurance their inclusion must be presumed in accordance with a well-established canon of constitutional interpretation. (*Dartmouth College* v. *Woodward*, 4 Wheat. 518; *1 Willoughby Constitution*, 337, sec. 150.)

Persuasive evidence of the applicability of Federal jurisdiction to these Indians as tribal Indians within the meaning of the Constitution is afforded by the unchallenged and unopposed action of the National Government in exercising its authority over numerous Pueblo Indians where no title to their lands has been granted to them or confirmed in them by Congress.

The Zuni Indians of New Mexico, perhaps the most enlightened of the Southwest (*Twenty-third Annual Report of Bureau of American Ethnology* (1901–2), Stevenson), are Pueblo Indians in this situation. The lands claimed by them were, however, constituted an Indian reservation by Executive order in 1877 (1 *Kappler Indian Laws and Treaties*, p. 880),

and they are subject to Federal control. The records of the Indian Office show also the establishment in the same manner of the Nambe Pueblo Reservation in 1902 and of the San Felipe Pueblo Reservation in the same year. Again, the Pueblo Indians of southern California have been treated like any others and have been established upon reservations and fully subjected to Federal control and authority.

The whole contention that the Pueblo Indians are outside of Federal control because nontribal Indians, however, proceeds upon the erroneous assumption that the jurisdiction of the National Government is derived exclusively from the commerce clause of the Constitution. Such is, of course, not the case, for a general supervisory and governmental authority arises and is vested in the United States by necessary implication from their very weakness and dependence and need of protection. (*United States* v. *Kagama*, 118 U. S., 375; *United States* v. *Celestine*, 215 U. S., 278; *Tiger* v. *Western Investment Co.*, 221 U. S., 286; *Heckman* v. *United States*, 224 U. S., 413.)

In the *Kagama case* this court held expressly that the act of Congress there involved, being a criminal measure, could not be supported as an enactment based upon the power conferred by the commerce clause, and squarely took the position just stated. It was said:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of

> those among whom they dwell. It must exist in that Government because it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The Pueblo Indians of New Mexico are indisputably in this situation. Although somewhat more civilized than the average Indian, and a sedentary, agricultural, and peaceful people, they are not the equal of their white neighbors, and have never been in a position to deal with them upon an equality.

They were expressly declared to be the wards of the Spanish Crown (Bandelier, *supra*, pp. 192, 197–8, 207), and many measures were enacted for their welfare and protection. (Recopilacion des Leyes de las Indias, Book 4, title 12, laws 9 and 18; Book 6, *passim*; Decree 20, Jan. 5, 1811, Hall, Mex. Law, §164.) Among other things, they were exempted from the payment of tribute (Decree of March 13, 1811, 1 White, Recopilacion, 411–12), the manner in which their lands might be alienated was restricted (Recopilacion des Leyes de las Indias, Book 6, title 1, law 27), and the sale of wine to them was prohibited. (Recop. Leyes des Indias, Book 6, Chap. I, Law 36.)

The last-mentioned law provided as follows:

> We order that in the places and pueblos of the Indians no wine shall enter nor shall it be sold to them * * *.

Some change in their position was doubtless effected by the establishment of the Mexican Republic and the

elevation of the Indian from subject to citizen. (*United States* v. *Ritchie*, 17 How., 575.) But the mere change in political rights could not *proprio vigore* alter their essential characteristics and eliminate their need of protection. Citizenship seems to have had little significance for the Pueblo Indian, and we venture to assert that he was in a measure the ward of the new government. Odious distinctions under the Spanish law were obliterated but not those founded on reason and of especial advantage to the Indian himself. (*Sunol* v. *Hepburn*, 1 Calif., 254, 280.) Pueblo lands remained subject to restrictions upon alienation. (*United States* v. *Pico*, 5 Wall., 536; the dissenting opinion in *Sunol* v. *Hepburn* admits this relative to Pueblo lands, p. 292.)

United States v. *Pico*, 5 Wall., 536, involved a proceeding to confirm a claim to California lands acquired under a Mexican Government grant, these lands constituting a pueblo. Speaking for the court Mr. Justice Field said:

> A pueblo once formed and officially recognized became entitled, under the laws of Mexico, to the use of certain lands for its benefit and the benefit of its inhabitants, and the lands were, upon petition, set apart and assigned to it by the Government * * *.
>
> The disposition of the lands assigned was subject at all times to the control of the Government of the country. The pueblo of Las Flores was an Indian pueblo, and over the inhabitants the Government extended a special guardianship.

This court had previously intimated (*United States* v. *Ritchie*, 17 How., 525, *supra*) that the citizenship of the Mexican Indian had not eliminated his need for governmental protection and supervision.

In support of the opposing contention are cited the cases of *United States* v. *Lucero*, 1 New Mexico, 422 (1869); *United States* v. *Santistevan*, 1 New Mexico, 583 (1874), and *United States* v. *Joseph*, 94 U. S., 614. All of them involved the same identical question: Whether section 2118, R. S., prohibiting settlement upon the lands of "Indian tribes" applied to the Pueblo Indians of New Mexico by virtue of an act of 1851 extending Federal Indian legislation to the Indian tribes of New Mexico. Section 2118, R. S., was merely a reenactment of one of the provisions contained in the Indian Intercourse laws of 1834. (4 Stat., 729.)

Following the Territorial courts, this court held in the *Joseph Case* that the Intercourse laws of 1834 referred exclusively to wild and semi-independent tribes and that in the act of 1851 Congress had intended such tribes and not the Pueblo Indians, there being such wild tribes to whom the act could apply.

The question involved was obviously only one of *statutory interpretation* and not of constitutional power, and it does not follow that because Congress by the words "Indian tribes" as employed in the acts of 1834 and 1851 *intended* only wild and semi-independent tribes that it could not have enacted a more comprehensive measure.

At that time the principal purpose of the control and restraint imposed upon the Indian and upon the intercourse of the white settler with him was the protection of the white man. The Indian was still feared, and it was sought to keep him isolated and undisturbed and to eliminate as far as possible all occurrences likely to provoke him to hostilities.

This was remarked by Chief Justice Marshall in *Worcester* v. *Georgia*, 6 Pet. 515, 552, in which connection he said:

> * * * What was of still more importance, the strong bond of the Government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder.

But no need existed for the exercise of a Federal power of this nature over the Pueblo Indians. They were a peaceful people, from whom reprisals were not to be apprehended, so that the presumption that Congress had not intended to include them in the phrase "Indian tribes" was a reasonable one.

In the present case, however, Congress has expressly and in terms extended its enactments to the Pueblo Indians. There is no question of intention but only of power, and the question arises at a time when the principal function relative to the Indians has swung over from the protection of their white neighbors to the protection of the Indians from unscrupulous adventurers seeking to exploit them. (*United States*

v. *Kagama*, 118 U. S. 375; *U. S.* v. *Rickert*, 188 U. S. 432, 437; *Jones* v. *Meehan*, 175 U. S. at p. 10; *Matter of Heff*, 197 U. S. 488; *Rainbow* v. *Young*, 161 Fed. 835.)

The Pueblo Indian stands in need of this protection, for being an Indian by race he is susceptible to the evil effects of intoxicants, and unless protected is likely to be deprived of all of his possessions and himself eliminated.

(2) Effect of Pueblo civilization.

What has just been said applies equally to the influence of the stage of civilization attained by these Indians.

In fact, it is not a very advanced stage. Their whole life has ever been dominated by a rigid and pervasive religious system. Their whole thought and creed is permeated with superstition, and many of their religious rites and observances are characterized by barbarous and obscene practices. (Bandelier's Report, *supra*, pp. 276, 295–6, 306.) Despite their unquestionably sincere profession of the Catholic faith, they have clung tenaciously to their own doctrines. (Ib., pp. 218–22.) Industrially they are in the transition stage from stone to metal of three centuries ago. (Ib., p. 210.) Their enlightenment scarcely seems equal to that of the Cherokee Nation, even before its removal to Indian Territory, and yet the latter have always been subject to Federal control.

(3) Effect of citizenship.

The Pueblos were citizens of the Mexican Republic (*United States* v. *Richie*, 17 How. 525), but it has never been decided that they are citizens of the United States. Citizenship, however, is not inconsistent or incompatible with the relationship of guardian and ward. Indians may be citizens and yet remain in a state of pupilage for many purposes. (*United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Sutton*, 215 U. S. 291; *Hallowell* v. *United States*, 221 U. S. 317; *Bowling* v. *United States*, 191 Fed. 22; *Rainbow* v. *Young*, 161 Fed. 835; *United States* v. *Logan*, 105 Fed. 240.)

Since the two capacities are not utterly irreconcilable and repugnant to each other, citizenship does not terminate the guardianship relation for the reason that the surrender of the latter is never presumed.

It must be effected expressly and positively; and since these are political questions, Congress is the sole judge of the occasion, time, and expediency of the relinquishment of its power. (*The Kansas Indians*, 5 Wall. 737; *Matter of Heff*, 197 U. S. 488; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Holliday*, 3 Wall. 407; *Lone Wolf* v. *Hitchcock*, 185 U. S. 555; *Hallowell* v. *United States*, 221 U. S. 317; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S 413.)

(4) Effect of ownership of lands.

Several of the Pueblos of New Mexico own their lands in fee simple, but in common, under grants from Spain confirmed by Congress. (10 Stat. 308; 11 Stat. 374; *Joseph* v. *United States*, 94 U. S. 614.)

This fact is also insufficient as a predicate for a surrender of Federal control. The Government's power coexists with the relationship of guardian and ward and independently of mere property rights. It does not depend upon some form of title in the United States either in reversion or in trust. (*Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Rickert*, 188 U. S. 432; *Peters* v. *Malin*, 111 Fed. 244 (Shiras, D. J.); *United States* v. *Allen*, 179 Fed. 13.)

The Cherokee Nation, with which the *Heckman* case dealt, held their lands by patent to the nation; the Pueblos hold theirs in common by grant to the Pueblo. There is absolutely no distinction in principle between the two cases.

Up to this point our primary concern has been to demonstrate the legal possibility of the relationship of guardian and ward between the United States and the Pueblo Indians and to prove that Congress has taken no action inconsistent with its continued existence and has therefore not terminated it. However, the matter does not end there, and there is ample positive evidence to show that Congress has all along affirmatively recognized and assumed the existence of the relationship and has acted upon this understanding.

In 1854 $10,000 was appropriated "for the purpose of making presents of agricultural implements and farming utensils to the bands of Pueblo Indians in the Territory of New Mexico." (10 Stat. 315, 330.)

In 1857 $7,500 was appropriated "for the general incidental expenses of the Indian service in the Territory of New Mexico, presents of goods, agricultural implements, and other useful articles, and in assisting them to locate in permanent abodes and sustain themselves by the pursuit of civilized life * * *" (11 Stat. 169).

In 1874 an appropriation was made for the pay of agents for the Pueblos and other tribes in New Mexico. (18 Stat. 146–7.)

Again, in 1882, Congress appropriated $7,500 "for the civilization and instruction of the Pueblo Indians of New Mexico, including the pay of teachers and the purchase of seeds and agricultural implements" (22 Stat. 83), and, beginning in the year 1898, Congress has annually provided and appropriated for a special attorney for them (30 Stat. 571, 594).

To assert in the face of this legislation that Congress has never assumed or exercised guardianship over these Indians is manifestly quite unwarranted. This is especially true, since otherwise all of these appropriations were pure gratuities or bounties; a disposition of public moneys by Congress never to be presumed, even though the power may exist. (*Allen* v. *Smith*, 173 U. S. 389; *United States* v. *Realty Co.*, 163 U. S. 427.) The assumption that Congress

appropriated these various funds in the performance of its duty as guardian to these Indians obviates any violation of this principle.

Furthermore, decisions by the Territorial courts predicated upon the nonexistence of Federal jurisdiction have immediately been nullified by express legislation.

A decision in 1904, in *Territory* v. *Delinquent Tax Payers*, 12 New Mexico, 139, to the effect that Pueblo lands were subject to local taxation was followed immediately by an act of Congress declaring them exempt. (Act of March 3, 1905, 33 Stat., 1048, at p. 1069.) The Enabling Act, in terms, perpetuated the exemption.

In *United States* v. *Mares*, 14 New Mex., 1, decided in 1907, it was held that Pueblo Indians and their lands were not in terms included under the act of 1897, prohibiting the sale of liquor to the Indians and the introduction of liquor into Indian country or trust allotments. This decision was nullified by the Enabling Act.

At all events there could have been no irrevocable abandonment by the Government of its paternal powers prior to the statehood of New Mexico. The irrevocable surrender of jurisdiction spoken of in *Matter of Heff*, 197 U. S., 488, is surrender to a State and not to an organized Territory only. Provided jurisdiction attached to these Indians upon their incorporation into the United States, it was capable of assertion by Congress at any time prior to the creation of new States. (*Wiggan* v. *Connoly*, 163

U. S., 56; *U. S.* v. *Sutton*, 215 U. S., 291.) And since Congress has declared in the Enabling Act that the Pueblo Indians are its wards, its action is conclusive, the question being political, and the State of New Mexico is utterly without cause for complaint.

Federal authority over the Pueblos and their wardship under the United States deprives them of nothing, nor does it violate any of the provisions of the treaty with Mexico inserted in their favor. They are not deprived of any rights upon which they would themselves insist, and in most cases the privileges and rights claimed for them as essential, are asserted by strangers and not always from the loftiest motives.

The real interest of the Indian does not demand recognition of a right freely to imbibe intoxicants when the inevitable consequence of his proneness to overindulgence is the loss of his possessions and his own extermination. The Indian's susceptibility to alcohol and its injurious consequences is a racial and not a political fact, and for that reason the Pueblo Indian by nature stands in need of protection equally with other Indians.

CONCLUSION.

The judgment of the District Court sustaining the demurrer to the indictment should be reversed.

WM. MARSHALL BULLITT,
Solicitor General.

LOUIS G. BISSELL,
Attorney.

FEBRUARY 25, 1913.

79769—13——3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 352

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

FELIPE SANDOVAL, DEFENDANT IN ERROR.

In Error to the District Court of the United States for the District of New Mexico.

PETITION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

A. B. RENEHAN,
Attorney for Defendant in Error,
Santa Fe, New Mexico.

In the Supreme Court of the United States

OCTOBER TERM, 1912.

No. 798.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

FELIPE SANDOVAL, DEFENDANT IN ERROR.

PETITION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN BEHALF OF DEFENDANT IN ERROR.

Now comes the defendant in error, by A. B. Renehan, his attorney, and prays the court to be allowed to file an additional brief supplementing and adding to the main brief heretofore filed, and for grounds of such motion shows the Court as follows:

1. That while this case was docketed at the October, 1912 term, as cause No. 798, upon said docket, said cause was advanced upon the docket and set for hearing for the 24th of February, 1913, upon motion of the United States.

2. That defendant in error consented to the advancement of said cause upon request made by counsel for the government, with the distinct understanding that the brief of the United States would be served upon counsel for the defendant in error at least forty days before the said 24th day of February, 1913.

3. That the brief of the United States was not served upon counsel for the defendant in error until the 25th day of February, 1913, one day after the date set for hearing, and printed brief was not served upon counsel until the day of the hearing in the above entitled cause, namely, the 27th day of February, 1913.

4. That counsel who appeared for the government in this court did not appear for the United States in the lower court, and counsel for defendant in error was thereby placed at a great disadvantage in preparing his brief, and was compelled to prepare the same without having before him the brief of the United States.

5. That counsel for the United States, upon this appeal, have taken a somewhat different position from that taken by counsel who appeared in the trial court.

6. That under the rules of this court the United States should have served a copy of its brief upon counsel for the defendant in error at least three weeks prior to the 24th day of February, 1913, in order to give counsel for the defendant in error an opportunity to be advised on the propositions for which the United States would contend, and an opportunity to reply thereto.

WHEREFORE, and for the reasons, stated, counsel for the defendant in error prays leave of the court to file his supplemental brief hereto attached.

A. B. RENEHAN,
Attorney for Defendant in Error,
Santa Fe, New Mexico.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 798.

UNITED STATES, APPELLANT,

vs.

FELIPE SANDOVAL, APPELLEE.

ERROR TO THE UNITED STATES DISTRICT COURT FOR NEW MEXICO.

MEMORANDUM OF POINTS MADE BY APPELLEE ON THE ORAL ARGUMENT NOT ADEQUATELY PRESENTED IN HIS BRIEF.

The brief for the Government was not filed until the morning of the argument, and appellee prepared his brief without benefit thereof. Hence a short statement is here given of the points in the oral argument for what assistance it may be in the nature of an index.

I.

Articles 8 and 9 of the Treaty of Guadalupe Hidalgo establishing peace between this country and Mexico, ratified

May 30, 1848 (9 Stats., 929), fixed the American citizenship of the Pueblo Indians.

II.

The act organizing the Territory of New Mexico, found at page 6 of the Compiled Laws of 1897 of that Territory, in section 6, required that those recognized as citizens by the said treaty should have the right of suffrage and office-holding.

III.

New Mexico gave the Pueblo Indians qualified suffrage, although leaving to Congress to say when they might vote at general election (C. L. of New Mexico of 1897, sec. 1678).

IV.

It made them corporations with right to sue and subject to suit in relation to their lands (sec. 1875, C. L., 1897).

V.

Its courts and the District Court of the United States to which the writ of error herein is directed, held these people citizens and not in any sense wards.

VI.

The Enabling Act, approved June 20, 1910, attempting to restrict the liquor traffic, imposed a condition which sought to take away the State's police power (sec. 2, subsections 1 and 8). In subsection 2 the State was coerced to "disclaim * * * all right and title * * * to all lands * * * owned or held by any Indian or Indian tribes * * * which shall have been acquired through or from

the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the *disposition* and under the absolute jurisdiction and control of the Congress of the United States," and they shall be exempt from taxation. It will be noticed that elsewhere in that act where these people were meant the word Pueblo was used to describe them, and its omission in this instance is significant, but not more significant than is the use of the word *disposition,* which in ordinary acceptation means *disposal,* and "carries with it the right of alteration or destruction, and also the right of alienation" (Webster's Dict.). Yet the United States never owned these lands. The Pueblos held them by a title superior to the United States (Joseph case, 94 U. S., 618). It cannot rightly therefore be said that Congress in that subsection referred to Pueblo lands, but it referred to lands of other Indians. The same provision is in practically all other enabling acts with the difference that here the additional words, "acquired through or from the United States or any prior sovereignty," are employed. This language is mere precaution. In other enabling acts the purpose was to hold control over those Indians to whom the Government owed a duty as guardian or over lands which belonged to it. Change of allegiance does not divest property rights, but in this case the treaty preserved them. Evidently Congress did not have the Pueblos in mind. This asserted authority, if conceded, would not only destroy a treaty obligation, but impair the obligation of a contract by means of a law of the State, the Constitution constrained by Congress. Thus the partial repeal of a treaty by implication would follow contrary to the rule against such implication. The constraint was noticed by the Constitution makers in these words: "In compliance with the requirements of the act of Congress."

VII.

New Mexico prohibits the liquor traffic among or with Pueblo Indians (Ch. 88, L. 1907, p. 196).

VIII.

Congress by virtue of its power to make rules and regulations for its own property (Morman Church *vs.* U. S., 136 U. S., 1) could favor any class of citizens residing therein, exempt them from taxation, give them presents, grant them aid. It could do likewise for the citizens of a State, and has done so without conditioning them as wards:

Granting lands at Hot Springs to a Masonic lodge (Ch. 69, 36 Stats., 906).

Legislating directly for Arizona and its fiscal and other affairs (Ch. 88, 36 Stats., 912).

Appropriating money for the transportation of relief to famine sufferers in China (Ch. 114, 36 Stats., 919).

Making provision for the care of the insane and for the education in Alaska (Ch. 384, 36 Stats., 744).

Providing means for completing the capitol of New Mexico (12 Stats., 710).

Donating lands to a Catholic church in Louisiana (12 Stats., 113).

IX.

The appointment of an agent for the Pueblo Indians is not sufficient to alter their status (Joseph case). Such agents and the attorney act in an advisory way and are frequently repudiated if the court can notice these facts.

X.

Citizenship existing, it will not be taken away by an inference drawn from a favor done. The reduction of a citizen

to the state of a ward will not be tolerated where the people thus sought to be affected are substantial, independent and competent. Presidents of Mexico, Porfirio Diaz and Benito Juarez, were of the Pueblo race. This court doubts that the Pueblos are Indians, saying: "If indeed they can be called Indians," and by adoption of the language of the Supreme Court of New Mexico it declares: "They are Indians only in feature, complexion and a few of their habits" (Joseph case).

XI.

If the treaty so provides, the foreign inhabitants become citizens of the State and of the United States (Boyd *vs.* Thayer, 143 U. S., 135; Dounes *vs.* Bidwell, 182 U. S., 244).

XII.

The Fourteenth Amendment "did not add to the privileges and immunities of a citizen." It simply furnished an additional guaranty for the protection of such as he already had (Minor *vs.* Happersett, 21 Wall., 171).

XIII.

If Congress expressly dictates and approves a provision of a State constitution concerning matters beyond its constitutional powers, such dictation and approval are ineffective because Congress has no power to supersede the National Constitution (White *vs.* Hart, 13 Wall., 649).

XIV.

Concerning the effect of the Government's relinquishment of all claim to the Pueblo lands, "it is unnecessary to waste words to prove that this was a recognition of the title previously held by these people and a disclaimer by the Govern-

ment of any right of present or future interference" (Joseph case). Yet it is contended, if subsection 2 of section 2 of the Enabling Act is asserted to relate to these people, that Congress can interfere and assume the right of disposition of these same lands.

Respectfully submitted,

A. B. RENEHAN,
Attorney for Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1912.

No. 798.

UNITED STATES OF AMERICA, PLAINTIFF IN *ERROR*,

vs.

FELIPE SANDOVAL, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

Brief in behalf of plaintiff in error having been finally served upon counsel for defendant in error, upon the 25th day of February, 1913, and subsequent to the preparation of defendant in error's main brief, and it appearing from brief of counsel for the United States that the United States now takes a somewhat different position from that taken in the trial court, counsel for defendant in error deems it necessary to add to and supplement his main brief, and to reply to the points discussed in the brief of plaintiff in error.

Counsel for the United States reduces the assignments of error to two propositions: (a) Congress had the power in admitting New Mexico to statehood to impose conditions relative to the Pueblo Indians within its borders; (b) The Pueblo Indians of New Mexico are "Indians," and, therefore, subject to the constitutional power of Congress over Indians. In his brief, under the first point, the Solicitor General refers to the same cases cited by counsel for the defendant in error.

If Pueblo Indians are "Indians" within the meaning of the Intercourse Acts, then Congress undoubtedly had the power to impose the restrictions contained in the Enabling Act of New Mexico. The Solicitor General, in effect, admits that Congress was wholly without power to impose the restrictions contained in the Act of June 20, 1910, unless the exercise of such power can be traced to some well defined constitutional provision. With this position we most heartily agree.

He bases his first argument upon the contention that

Congress has the right to legislate for the Indians, and that the Pueblo Indians are "Indians" within the meaning of the Intercourse Acts. The Solicitor General contends that the Pueblo Indians became wards of the Federal Government the instant the territory ceded by Mexico, under the treaty of Guadalupe Hidalgo, was incorporated in the United States, for the reason that wardship was not at that time disclaimed either expressly or by necessary implication.

In our main brief, we showed conclusively that the Pueblo Indians were citizens of Spain, and entitled to all the rights of citizens of that monarchy, at least from 1811 down to the independence of Mexico in 1821. We also showed that the Pueblo Indians had all the rights of citizenship under the Republic of Mexico; that they stood on exactly the same footing as all other inhabitants of that Republic at the date of the treaty of Guadalupe Hidalgo. They were a part of the body politic of Mexico upon that date, and upon the incorporation of New Mexico into the United States were entitled to all the rights, privileges and immunities granted to citizens of Mexico by the treaty.

The Solicitor General contends that the presumption is strong in favor of the original existence of federal jurisdiction over all Indians, and against its subsequent voluntary relinquishment; also that the surrender of authority and control over the Indian which resides in the United States is not lightly to be presumed; and that positive and unmistakable evidence is required to establish it. We think it has been clearly established that the United States never did exercise guardianship over the Pueblo Indians, or exercise any other kind of Federal jurisdiction over the Pueblo Indians, other than the control it exercised over all other citizens of New Mexico. The statutes in force with reference to the power of the Federal Government to control the Indians within the Territory of New Mexico are found in Secs. 1839 and 1840, Revised Statutes United States (Act of September 9, 1850).

> "Section 1839. Nothing in this title shall be construed to impair the rights of person or property pertaining to the Indians in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any territory now or hereafter organized until such tribe signifies its assent t)

the president to be embraced within a particular territory."

"Section 1840. Nor shall anything in this title be construed to affect the authority of the United States to make any regulations respecting the Indians of any territory, their lands, property, or rights by treaty, law, or otherwise, in the same manner as might be made if no temporary government existed, or is hereafter established, in any such territory."

By the provisions of Section 1859, Revised Statutes (Act September 9, 1850), Congress declared that every male citizen, above the age of twenty-one, being actual residents of any territory at the time of the organization thereof, shall be entitled to vote at the first election in said Territory, and to hold any office therein.

"Section 6 of the Organic Act: And be it further enacted, That every free white male inhabitant, above the age of twenty-one, who shall have been a resident at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be prescribed by the Legislative Assembly: PROVIDED, That the right of suffrage, and of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the Republic of Mexico, concluded February second, eighteen hundred and forty-eight."

By the provision of the treaty of Guadalupe Hidalgo, Articles 8 and 9 (quoted in full in our main brief) the status of former citizens of the Mexican Republic, within the territory ceded to the United States, was definitely fixed.

In the face of these solemn declarations of the Federal Government, how can it be contended that Federal control or jurisdiction attached to the Pueblo Indians immediately upon the ratification of the treaty of Guadalupe Hidalgo?

The mere fact that the Pueblos lived in towns or self-governing communities cannot have any significance. The European Spaniards and their descendants adopted the same plan; land grants were made to communities by the Spanish Crown, and these grants today are known as town grants (in Spanish. Pueblo grants). These towns also had practically a complete local government with an alcalde, and, in some instances, a governing council. This form of town or

community government continued for many years after the acquisition of New Mexico by the United States. If the contention of the Solicitor General is sound, Congress might with equal propriety, claim Federal jurisdiction over the descendants of European Spaniards residing within the territorial limits of the then Territory of New Mexico, and, upon the same theory, could have retained Federal jurisdiction over all lands owned and occupied by descendants of European Spaniards, upon the 20th day of June, A. D., 1910.

Under the Mexican Republic, all distinctions between Indians, Negroes, Mexicans, European Spaniards, and other inhabitants of the Republic had been wiped out. That condition existed at the date of the treaty of Guadalupe Hidalgo, and these people became an integral part of the United States as former citizens of the Republic of Mexico.

Having once recognized the Pueblo Indians as full fledged citizens, with all the rights, privileges and immunities of such citizenship, Congress was without power to repudiate its prior acts and solemn declarations.

In re Heff, 197 *U. S.*, 488;

United States vs. Clairmont, 225 *U. S.*, 551;

United States vs. Mosier, 198 *Fed.*, 54;

United States Express Co. vs. Friedman, 191 *Fed.*, 673-680.

Counsel for the Government contends that citizenship is not inconsistent or incompatible with the relationship of guardian and ward. This is true with certain reservations. Counsel for the United States cites the cases of United States vs. Celestine, United States vs. Sutton, Hallowell vs. United States, and other cases, to this proposition. As we stated in our main brief, an examination of these cases discloses that the power of Congress to legislate, and the exercise of Federal jurisdiction thereunder, can in each and every instance be traced back to a well recognized constitutional provision. In some cases the power rests upon a solemn treaty made with the Indians as tribal Indians; in others, it rests upon the plenary power of Congress to legislate for the Indians (meaning thereby tribal Indians), within the meaning of the Intercourse Acts; in still others, it may be traced back to the power of Congress to regulate interstate commerce.

Not a single one of these cases is authority, however, for the proposition that where Congress has once recognized

the citizenship of the Indian, and definitely relinquished control over the lands of the Indians, Congress can thereafter, at pleasure, resume control and jurisdiction over the Indians and the lands of the Indians.

In the case at bar it has been definitely established that the Pueblo Indians were not tribal Indians within the meaning of the Intercourse Acts; it has been established that Congress never did have control or jurisdiction over the lands of the Pueblos; and it has also been definitely established that the Indians were citizens of Mexico, and as such became citizens of the United States by definite and solemn declarations of Congress and the Federal Government. Such being the status of the Pueblos, the doctrine laid down in the Heff case is a complete answer to the contentions of the Solicitor General.

The Solicitor General contends that the acts of Congress appropriating moneys and furnishing supplies for the Pueblo Indians make the Pueblo Indians wards of the Federal Government. The utter absurdity of this argument is apparent without further discussion. The power of the Federal Government to make such appropriations and such provisions for the benefit of the Pueblo Indians rests solely upon the right and power of Congress to appropriate public moneys. If acts of this character make the Pueblo Indian a ward of the Federal Government, with equal propriety it might be contended that the acts of the Sixty-second Congress appropriating moneys for the benefit of the people of the lower Mississippi valley thereby made the people of that section wards of the Federal Government.

The Act of Congress (Act of March 3, 1905) whereby Congress attempted to exempt lands of the Pueblo Indians from taxation was absolutely unnecessary, as the lands of the Pueblo Indians have always been exempt from taxation since the territory included within what is now the State of New Mexico was ceded to the United States by the Republic of Mexico. These grants were town grants or municipal grants, and it is elementary that the government cannot tax itself or its own property. These grants, except the small parcels held in severalty, were and now are town or community grants, and so long as the common lands belong to the municipality they are not subject to taxation by the State of New Mexico, any county or other political subdivision of the state.

It is a very common and ordinary thing for governments to exempt certain properties, industries, and even classes of people from taxation, either in perpetuity or for a limited

time. In New Mexico new railroads are exempt from taxation for a period of six years from the date of completion of construction. Sugar beet factories are exempt from taxation for a limited period. Schools, churches, property belonging to religious and charitable organizations are exempt from taxation in many jurisdictions. Prior to statehood, Congress had the undoubted right to declare that the lands held by the Pueblo Indians were exempt from taxation. Congress also had the right prior to January 5, 1912 (the date New Mexico became a state), by specific legislation to exempt from taxation any class of property it desired, within the then Territory of New Mexico. If Congress had so desired, prior to statehood, it could have declared that the property owned and occupied by descendants of European Spaniards, within the Territory of New Mexico, should be exempt from taxation for a definite period of years.

The various appropriations made by Congress for the benefit of the Pueblo Indians can all be supported under the constitutional power to appropriate public moneys, and the act exempting the Pueblo Indians from taxation under the constitutional power of Congress to legislate for the Territories. Congress could, with equal propriety, as we have heretofore stated, have passed any and all of these acts in the interest of any other citizens or residents of the Territory of New Mexico.

The Solicitor General contends that the mere fact that the Pueblo Indians are of Indian lineage furnishes a sufficient basis for Federal Jurisdiction. In reply we adopt the language of the trial judge in his opinion in this case. (Tr. p. 23).

> "We have therefore left as the sole basis upon which Federal Jurisdiction may be retained over these people the fact that they are of Indian lineage. Is this enough? There is, from a governmental standpoint, no magic in the word Indian. It has through the course of our legislation indicated a condition no less than a race. With the condition gone by the assimilation of the person into the body politic and the release of his land from governmental control by the issuance of unconditional patents his race loses significance. If the mere fact that he be an Indian is of itself sufficient to justify his being held always subject to a species of Federal police power, that power would seem likewise logically to extend to his remote posterity, for they, like him, have Indian blood in their veins calling for the national guardianship. The length to which this will go will be appreciated when we recall that high State officials and leading members of

Congress have been of Indian race. Can it be that to sell to such citizens or to deliver at the home of such a citizen an intoxicant is a matter of Federal concern? The question carries its own answer, and yet this is precisely what is claimed when it is asserted that to sell intoxicants to a Pueblo Indian citizen upon his own farm shall, so long as he, an Indian, owns it, be a matter to be regulated purely by Congress. Such, in my judgment, is a claim of power for Congress that it does not possess. More than this, it is a detraction from the police power properly belonging to the State, and if upheld has the effect to admit New Mexico shorn of its powers possessed by every other State in the Union. It cannot, therefore, be sustained."

CONCLUSION.

All other propositions advanced by counsel for the United States having been met in the main brief, it is respectfully submitted that the decision of the trial court should be sustained. Respectfully submitted,

A. B. RENEHAN.

17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 852

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

FELIPE SANDOVAL, DEFENDANT IN ERROR.

In Error to the District Court of the United States for the District of New Mexico.

BRIEF OF DEFENDANT IN ERROR.

A. B. RENEHAN,
Attorney for Defendant in Error,
Santa Fe, New Mexico.

INDEX.

TABLE OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 798.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

FELIPE SANDOVAL.

STATEMENT OF FACTS.

The defendant, Felipe Sandoval, was indicted at the April, 1912, term of the United States District Court for the District of New Mexico, the indictment being as follows, (omitting the charging part):

> "That Felipe Sandoval, late of the District of New Mexico, on the 19th day of March, in the year of our Lord 1912, at the District aforesaid, unlawfully and feloniously did introduce into the Indian country, to-wit, the Santa Clara Pueblo, in the District aforesaid, certain intoxicating liquor, to-wit, two quarts of wine ,contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

To this indictment a demurrer was interposed which attacked the indictment as stating no offense against the federal law.

The indictment is brought under the act of January 30, 1897, 29 Stat. 506:

> "That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title

to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

At the time of the oral argument counsel made a stipulation of facts for the purpose of raising upon the demurrer the questions of law involved:

"It is hereby stipulated and agreed, by and between counsel for the parties hereto, for the purposes of the demurrer to the indictment only, as follows:

"1. That the Pueblo Indians of Santa Clara are Pueblo Indians of New Mexico.

"2. That the lands of the said Pueblo Indians of Santa Clara, known as the Pueblo grant of Santa Clara, were owned and occupied by them upon the 20th day of June, 1910, and at the time of the admission of New Mexico as a State, and are such lands as are designated Indian country in sec. 8 of Art. XXI of the constitution of the State of New Mexico.

"3. That said Indians acquired right and title to and ownership, in fee simple, of said grant through a prior sovereignty, to-wit, the Kingdom of Spain.

"4. That as to the locus of the offense sought to be charged in the indictment in said case, the title of the said Indians has not been extinguished.

"5. That this stipulation shall be deemed to have been filed nunc pro tunc as of the date of the argument upon the demurrer and shall be deemed and considered as part of any record upon appeal in event a writ of error shall be sued out without the necessity of the court signing and settling the same as a bill of exceptions."

The real controversy upon this appeal arises upon certain provisions of the Act of June 20, 1910, (36 Stat. 557) enabling the people of New Mexico and Arizona to form a Constitution and state government. It is therein enacted that the constitution of New Mexico to be framed shall provide, "by an ordinance irrevocable without the consent of the United States and the people of said State, * * * that * * * the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited." The act further requires a similar ordinance to the effect "that the people * * * * forever disclaim all right or title to * * * all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the United States." It is further required by the act that the constitution as framed shall contain an ordinance providing: "That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of 25 years after such allotment, sale, reservation, or other disposal, to all the laws of the United States prohibiting the introduction of liquor into Indian country, and the term 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them."

The Constitution of New Mexico as framed, and approved by the President of the United States, contains ordinances "declared to irrevocable without the consent of the United States and the people of the State," containing in so many words the above quoted provisions required by the Enabling Act.

> "Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship. Polygamous or plural marriages, polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians, the introduction of such liquors into the Indian country, which term shall also include all lands owned or occupied by the Pueblo Indians of New Mexico on the twentieth day of June, nineteen hundred and ten, or which are occupied

by them at the time of the admission of New Mexico as a state, are forever prohibited."

(Sec. 1, Article XXI, Constitution of N. M.)

"Whenever hereafter any of the lands contained within Indian reservations or allotments in this state shall be allotted, sold, reserved or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation or other disposal, to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the term 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands owned or occupied by them on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state."

(Sec. 8, Art. XXI, Constitution of N. M.)

The demurrer was sustained by the trial court and judgment of dismissl entered. From this judgment the United States has sued out this Writ of Error.

BRIEF AND ARGUMENT.

The nine assignments of error naturally group themselves under three heads and in considering the same our attention will be directed to the following propositions:

First Proposition:—The Indians known as "Pueblo Indians" are not Indians in the contemplation of the Indian Intercourse Act, but are citizens of the United States and of the State of New Mexico.

Second Proposition:—The lands of the "Pueblo Indians" are not such lands as are known as "Indian country," but are held by them in fee simple, segregated from the public domain, free from all conditions.

Third Proposition:—The provisions of the Enabling Act, (The Act of June 20, 1910), and of the Constitution of the State of New Mexico, attempting to bring the Pueblo Indians and their land within the terms of the "Intercourse Act" are a nullity.

(a) Because Congress had no power to impose such restrictions as a condition precedent to the admission of New Mexico as a state.

(b) Because the State of New Mexico had no power to surrender its right to regulate its internal police affairs.

TREATING OF THE FIRST PROPOSITION.

"The Indians known as 'Pueblo Indians' are not Indians in the contemplation of the Indin Intercourse Act, but are

citizens of the United States and of the State of New Mexico."

A determination of the status of the Pueblo Indians in New Mexico requires considerable historical reference. While it seems almost unnecessary to go into a discussion of the status of the Pueblo Indians, in view of the numerous decisions by this court and by the Supreme Court of the Territory of New Mexico ,a brief review of some of the ancient decrees, proclamations and laws determining the rights of the Pueblo Indians under Spanish and Mexican administrations may be instructive.

As early as the year 1551 we find that the Spaniards made special provision for the Indians known as Pueblos. The first law in the Codes is that of the Emperor Charles V given in Cigales on the 21st of March, 1551, and reproduced by King Philip II, as appears in Law I, Title 2, Book 6, of the Recopilacion de los Indias. (Hall's Mex. Law, Sec. 154). This law provides that the Indians shall be reduced to Pueblos, and that they should not live separated in the mountains, depriving themselves of all spiritual and temporal benefits.

Law 8, Title 3, Book 6 of the Recopilacion de Los Indias, provides for the plan and location of Pueblos. By the royal cedula of June 4, 1687, power is given to the viceroy and president of the Royal Audiencia to fix the amount of land either within or without the Pueblos, to be given to the Pueblo Indians.

Throughout the Spanish laws, prior to the establishment of the Mexican Republic in 1821, the Spaniards made a clear distinction between the Pueblo Indians and the savage or nomadic Indians. The Apaches, Commanches, Navajos and other nomadic Indians were designated and known as "savages," or "Indios Barbaros." In legislating for the Pueblo Indians we find the Spanish law-makers using the word "Habitantes" when referring to the Indians. This expression, literally translated, refers to those living in houses, towns or communities, and necessarily refers to the Pueblo Indians as they were the only Indians having a fixed place of abode.

It is clear from a careful study of the Spanish laws that the Indians, meaning the Pueblo Indians, as distinct from the "savages" or "Indios Barbaros", were entitled, under the law, to own and control property both real and personal, and, subject to certain restrictions, could sell and dispose of the same.

In 1680 occurred the rebellion of the Pueblos, and practically all of the Spaniards then residing within the limits of what is now New Mexico were driven out of the country and the entire country remained in the control of the Pueblo In-

dians until about 1692. By 1689 the Spanish Government had gradually re-conquered the country and, undoubtedly with a view of winning over the Pueblo Indians, made grants to the various Indian Pueblos which were within the then provinces of New Mexico. Each of these grants was made about the same time and is in about the same language. The case of the United States v. Lucero, 1 N. M., 445, sets forth a copy of one of these grants. The Santa Clara Pueblo grant is in practically the identical languge of the grant made to the Cochiti Pueblo, set forth in the opinion of the United States v. Lucero, *supra*. In these grants the Pueblos were spoken of as being rebels against the Government, and not as being savage Indians, savages or barbarians.

So far as we are able to discover from a careful examination of the ancient Spanish laws there were no restrictions upon the Pueblo Indians, or their rights of property, from 1689 down to the year 1781. On the 21st of February, 1781, the Viveroy, D. Martin Mayorga, published a decree of the Audiencia, prohibiting the Indians, "Pueblos," from selling their real estate without a license from the proper authority. This decree probably remained in force until the date of the independence of Mexico. (Hail's Mexican Law, Sec. 161).

Under March 13, 1811, there was promulgated the following decree:

> "The general and extraordinary Cortes having carefully examined the decree published by the former Council of the Regency, in the Royal Island of Leon, of the 20th of May of the year 1810 last past, and the proclamation for its execution ordered to be published in Mexico by the Viceroy of New Spain, Don Francisco Xavier Venegas, of the 5th of October of the same year; and at the same time that they have thought proper to approve the exemption from tribute, granted in the aforesaid decree, to the Indians, with the extension declared by the aforesaid Viceroy in the above mentioned proclamation in favor of the castes of mulattos, negroes and others, who have remained, and do remain faithful to the sacred cause of the country in the district of that Viceroyalty; decree:
>
> 1. That the aforesaid favor of exemption from tribute shall be extended to the Indians and other castes in the other provinces of America.
> 2. That the favor of the distribution of lands in the villages of the Indians does not extent to the castes.
> 3. That the greatest rigor be observed in executing the royal orders and dispositions which prohibit the jus-

tices from continuing the abuse of trading within their repective jurisdictions under the specious pretext of distributions."

(White's New Recopilacion, Vol. 1, p. 411.).

We also find two very interesting documents in the archives of the Surveyor General's office at Santa Fe. The first is a proclamation of Commandant General Nemecio Salcedo promulgating a decree dated March 24th, 1811, placing the Spanish-Americans and Indians on an equality in political rights with European Spaniards. The second is a decree of the Commandant General of the Internal provinces, promulgating a decree of the Cortes of February 9, 1811, establishing the equality of the Indians with the Spaniards. As these two documents do not appear in any standard work, so far as we have been able to discover, we set out a complete translation of both instruments.

"Don Nemecio Salcedo y Salcedo, Brigadier of the Royal Armies, Governor and Commandant General in Chief of the Internal provinces of the Kingdom of New Spain, Inspector General, Sub-Delegate of the Royal Treasury and tobacco industry, Juez Conservador (person appointed to defend the rights of the community) of the latter, and Sub-Delegate General of the Mails.

The Sir Secretary of the Royal Council of the Indies has addressed to me, on the date of the 6th of April last, which I received on this same day, the Royal Decree, the context of which, literally, reads thus:

'The King, Don Fernando VII and in his absence and captivity, the Council of the Regency of Spain and the Indies, in the meantime authorized by the general and extraordinary Cortes, under date of the 26th of February last, Don Jose Antonio de las Rumbide, provisional secretary of the department of Grace and Justice, presented to my Council of the Indies, the decree which reads as follows: 'The general and extraordinary *cortes*, always firm in its principles, sanctioned by the decree of the 15th of October of the last past year, and desiring to secure forever to the Americans, Spaniards as well as original natives, of those large dominions of the Spanish Monarchy, all the rights that as an integral part of the same they are to enjoy in the future, do decree:

Article 1st. That one of the principle rights of the Spanish people being their competent representation in the National *Cortes*, that of the American part of the

Spanish Monarchy, in all that hereafter may be held, be entirely equal in the manner and form to that which is to be established in the Peninsula, establishing in the constitution the order of this national representation upon the basis of perfect equality in accordance with said decree of the 19th of October last.

2nd. That the natives and inhabitants of America may sow and cultivate whatever nature and skill may afford to them in those climates, and at the same time promote the industry, the manufactures and the arts in all its extent.

3rd. That the Americans, as well as Spaniards and Indians, and the children of both classes shall have equal rights with the European Spaniards in all classes of business and official positions, as well in the courts as in any other place of the Monarchy, whether in the ecclesiastical, political or militry profession. The Council of the Regency shall take notice and resolve whatever is necessary to its compliance, ordering it to be printed, published and circulated.—Antonio Joaquin Perez, President. Jose Asnares, Deputy Clerk.—Vicente Tomas Traver, Deputy Clerk.—Given in the Royal Island of Leon on the 3rd day of February, 1811.—To the Council of the Regency.—And in order that it may be known by all, the Council of the Regency orders it printed and circulated. Take notice thereof and resolve what is necessary to its fulfillment. Joaquin Blake, President—Pedro Agar—Gabrial Ciscar—Royal Island of Leon, February 19, 1811.—The foregoing decree was published in the aforesaid council of the Indies on the 28th of February in compliance therewith. Wherefore, and for the information and satisfaction of those my beloved subjects, I order my Viveroys, Presidents, Law Officials, Governors Captains, Generals, Intendents, and the Councils, Magistrates and Regiments of the capital cities of my kingdom of the Indies and adjacent islands, and Philippines, that upon receipt of this royal decree, each one of them shall attend to that part pertaining or that may pertain to him in its fulfillment, publishing it by proclamation, by the chiefs of each kingdom and province in order that none of those my subjects shall ignore that my general and extraordinary courts are constantly vigilant in order to afford them, by every means, their true happiness. Given in Cadiz on the 24th of March, 1811.—I, the King —Joaquin Blake, President.—By order of the King our Lord.—Jose de Alday.—Stamped with three rubrics.'

"And in order that the foregoing sovereign resolution

may be known to all for its faithful due compliance, I order that, as herein stated, it be published by proclamation in this capital and in all the other cities, villages and places comprising these provinces of my jurisdiction, to which end the proper number of copies shall be transmitted to the governors in charge thereof.—Given in Chihuahua on the 21st of October, 1811.

NEMECIO SALCEDO (Rubric.)"

(Archive No. 134, Surveyor General's Office, Santa Fe, N. M.)

"Don Alejo Garcia Conde, Knight of the Grand Cross of the Military and National Order of San Hermenegildo, Field Marshal of the National Armies, Governor, Commandant General and Political Superior Chief of these four Provinces of the Occident of New Spain, etc.

"Through the Most Excellent Sir, Secretary of State and of the office of the Governor of Ultramarine, Don Antonio Porcel, there have been addressed to me by royal order of the 19th of July of the last past year, several royal decrees, the third of which is as follows:

'The general and extraordinary *Cortes,* always firm in its principles, sanctioned by the decree of the 15th of October of the last past year and desiring to secure forever to the Americans, as well Spaniards as natives, of those vast domains of the Spanishh monarchy, the rights which as an integral part of the same they are to enjoy in the future, decree:

Article 1. That it being one of the principal rights of all the Spanish Settlements to have a competent representation in the National Cortes of the American portion of the Spanish monarchy, in all the sessions that the same may celebrate, (it is decreed) that the same shall be complete and equal in manner and form to the one that may be established in the Peninsula, the order of this national representation to be fixed in the Constitution on the basis of perfect equlity in accordance with the said decree of the 15th of last October.

Article 2. That the Natives and inhabitants of America may sow and cultivate whatsoever nature and art may permit in those climates, and may likewise promote industry, manufacture and art, to the fullest extent.

Article 3. That the Americans, whether Spanish or Indians, and the children of both, shall have equal rights with the European Spaniards in employment and appointments to office, whether in the Cortes or any other place of the monarchy, be the same of the ecclesiastical,

political or military profession. And it is hereby communicated to the Council of the Regency, which shall arrange all that may be necessary, such as its printing, publication and circulation for its fulfillment.—Antonio Joaquin Perez, President.—Jose Asnares, Deputy Clerk.—Vicente Tomas Traver, Deputy Clerk.—Given in the Royal Island of Leon on the 3rd of February, 1811.—To the Council of Regency.'

"And in order that said sovereign resolution be known by all the inhabitants of my jurisdiction, I order, as Superior Political Chief thereof, that it be published by proclamation in its respective districts, to the end of which the proper copies shall be forwarded to the Sirs Magistrates, Prelates, Diocesans, Constitutional Ayuntamientos and all other persons whose duty it is to enforce its compliance.—Given in Chihuahua on the 20th of February, eght hundred and twenty-one.

ALEJO GARCIA CONDE (Rubric)
FRANCO VELASCO (Rubric)"

Archive No. 1028, Office Surveyor General, Santa Fe, N. M.)

The foregoing decrees of the Cortes were issued and promulgated during the period of the Regency. It must be remembered that this was the period of the Napoleonic wars. The King of Spain, Don Fernando VII, was held captive during this period. Upon his restoration to the throne, after the overthrow of Napoleon, he repealed a number of the decrees and laws promulgated by the Cortes, but so far as our investigations have gone it does not appear that the decrees above set out were repealed. In fact, White, in his New Recopilacion, at page 410, et. seq., Vol. 1, sets out the decrees of the Cortes, which he states remained in force even after the independence of Mexico in 1821, and down to the treaty of Guadalupe Hidalgo, in 1848. He includes in this list the decree of March 13, 1811, but makes no reference to the decree of February 9, 1811.

The independence of Mexico dates from the 21st day of August, 1821. Prior to said independence the revolutionary government of Mexico, on the 24th day of February, 1821, had adopted what is called the "Plan of Iguala," by which plan it was declared:—

"That all the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of this monarchy with a right to be employed in any post according to their merits and virtues."

By the treaty of Cordova, August 24, 1821, the principles of the Plan of Iguala are fully recognized and affirmed. On the 28th day of September, 1821, the Declaration of Independence was issued in which the principles of the Plan of Iguala were again asserted and affirmed. On the 24th day of February, 1822, and the 9th of April, 1823, the Mexican Congress declared the equality of civil rights to all the free inhabitants of the empire whatsoever may be their origin in the four quarters of the earth. And again, it affirmed therein the independence of New Spain, the perpetuity of the Catholic religion and the union *of all Mexicans of whatever race.* In 1823 Mexico was an Empire with Yturbide as Emperor. On the 17th day of September, 1822, the Mexican Congress decreed:—

> "That in any register, and public and private documents, on entering the name of citizens of this Empire, classification of them with regard to their origin shall be omitted."

The foregoing treaties, laws and decrees may be found in a collection of decrees published by Mariano Galvani, Vol. 1, Secs. 12, 13, p. 4, and Sec. 1, p. 32; also Vol 2, pp. 80, 92, and Sec. 16, p. 127. They are all referred to in the case of United States v. Santistevan, 1 N. M., 583; United States v. Richie, 17 How. 525, at page 538. (See, also, Vol. 2 White's New Recopilacion, pp. 703-794).

> "It was natural that in laying the foundations of the new Government all previous political and social distinctions in favor of European or Spanish blood should be abolished, and equality of rights and privileges established. Hence the article to this effect in the Plan of Iguala and the decree of the first Congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the Government had the effect, necessarily, to invest the Indians (Pueblos) with the privileges of citizenship as effectually as had the Declaration of Independence of the United States, of 1776, to invest all of those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies. * * * * But as a race, we think it impossible to deny that, under the constitution and laws of the country, no distinction was made as to the rights of citizenship, and the privilege belonging to it, between this and the European or Spanish blood. Equality between

them, as we have seen, has been repeatedly affirmed in the most solemn acts of the Government. Solano, the grantee, in this case, was a civilized Indian, was a principal chief of his race in the frontiers of California, held a captain's commission in the Mexicn army and is spoken of by the witnesses as a brave and meritorious officer.

"Our conclusion is, that he was one of the citizens of the Mexican Government at the time of the grant to him, and that, as such, he was competent to take, hold and convey real property, the same as any other citizen of the Republic."

(U. S. v. Richie, 17 How. pp. 539-540).

The Supreme Court of the Territory of New Mexico, in the case of United States v. Lucero, 1 N. M., 423, in a very elaborate and thoroughly considered opinion goes fully into the relations of the Pueblo Indians to the Republic of Mexico and to the Government of the United States and, after full consideration and reasoning on the subject, holds that they were citizens of the Republic of Mexico and, as such, became citizens of the United States under the provisions of the Treaty of Guadalupe Hidalgo, and were not to be considered in any sense of the word as Indians under the Indian Intercourse Act. On page 430 of that opinion, the court said:

"The Spanish scholar will not fail to remember that when Spanish law books and Spanish legislators speak of Indians, they mean that civilized race of people who live in towns and cultivate the soil and are often mentioned as "naturales" and "Pueblos," natives of the towns, and as "Indios del Pueblos," Indians of the towns; and for the other distinct and separate class of Indians whose daily occupation was war, robbery and theft carried on against the Pueblo Indians, as well as the Spaniards, the term savages (salvajes) or barbarous Indians (Indios Barbaros) was the expression used. * * * * Neither the Spanish crown, "its viceroys in the new world nor the Mexican Republic ever legislated for the savage class of Indians."

On page 432 of that opinion the court, following the opinion of this court in United States v. Ritchie, cited supra, said:—

"The act of the 9th of April, 1823, re-affirms the three guarantees of the Plan of Iguala: 1. Independence of New Spain; 2. The perpetuity of the Catholic religion; and

3. The union of all Mexicans, of whatever race. It will thus be seen that the Indian race of Mexico, and that portion ,and a vast portion, of the inhabitants to whom that term was properly applicable, were recognized as citizens of the Republic of Mexico in all her plans of government and acts of solemn obligation putting into practical operation that plan. Now, if there is no law of the Republic of Mexico, (and we are unable to find any) taking away the rights of citizenship with which the Indian race was vested as far back as the 24th of February, 1821, the conclusion is forced upon us, that they, (the Indian race) were in fact Mexican citizens at the date of the Treaty of Guadalupe Hidalgo and are entitled to the benefit of all the articles in said Treaty designed to protect the life, religion and property of Mexicans under the new sovereign in whose hands the destinies of war had placed them."

This decision in United States v. Lucero was never appealed from by the United States, but left to stand as the final and binding decision and ever since that time the rights of these Pueblo Indians, as far as the territorial government of New Mexico was concerned, were made to conform to it.

The provisions of the Treaty of Guadalupe Hidalgo fixing the status and rights of Mexican citizens residing within the territorial limits ceded to the United States, are as follows:

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.

"Those who shall prefer to remain in the said territories ,may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to its guarantees, equally ample as if the same belonged to citizens of the United States." (Art. VIII.)

"Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoymen of all the rights of citizens of the United States, according to the principles of the constitution; and in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." (Art. IX.)

There have been numerous decisions of this court and of the Supreme Court of the Territory of New Mexico construing the provisions of the Treaty of Guadalupe Hidalgo, quoted *supra*. One case in particular is that of the United States v. Varela and Anthony Joseph, et. al., found in 1 N. M. It said:

"The only question to be considered is whether each of the declarations in these several causes presents a prima facie case under the statute. The act of Congress of June 30, 1834, U. S. Stats. at Large, 729, is the only statute under which an action of this kind can be sustained. * * * * *"

"It seems clear that Indian tribes to which these acts of congress can only apply are such as may be classed as distinct, independent, domestic nations, having and maintaining distinct tribal organizations, capable of maintaining the relations of peace and war; who maintain their own natural rights, including that of governing themselves as independent political communities, and who as such independent political communities hold only treaty relations with the United States, very much on the footing of quasi foreign nations. The only other relations are such as the United States may gratuitously assume, as a superior power, and as a protectorate. All these relations are expressly indicated by the act referred to, and the various adjudications in reference to the class of Indian tribes embraced in such acts."

"It would seem to follow from these relations that contracts and conveyances can be entered into and made between such communities and the Government, only by treaty, and, therefore, that the only way in which the United States can contract with these independent domestic nations, whereby public lands can be secured or granted to them, is by or under a treaty." (This decision was rendered in 1874, at the time the Government treated the savage Indians as independent nations and made treaties with them.) "As soon as these relations cease to exist, they lose their character and identity as distinct and independent political communities, and at once become merged in and identified with our own body politic, subject and amenable to our laws, and can no longer be considered as wards of the government."

"There is another distinguishing feature, whereby the Indian tribes, to which the statute can only apply, may be identified, and that is, they must be Indian tribes with whom all intercourse must be carried on exclusively by or under the direction of the general government."

"One of the questions to be determined is whether from the term 'pueblo tribe of Indians' of a certain designated 'pueblo,' in the absence of any other descriptive allegation in the declaration, the court can rightfully infer that it is such an 'Indian tribe' as is covered by the statute, and between whom and the general government the distinctive relations I have pointed out necessarily subsist. The words of the statute are 'Indian tribe;' the words of the declaration are 'pueblo tribe of Indians of a pueblo.' A word is here used in pleading that is unknown to the English language, except by common consent as descriptive of these peculiar Indian communities, and their places of abode. The Spanish word 'pueblo' originally applied to these communities by Spain, whose subjects they formerly were, and for a purpose, is something more than a mere name, such as Apache, Comanche, or Navajo. Pueblo, as defined in the Spanish language, signifies inhabited town or village, and in the plural is used to designate either towns or the inhabitants of towns. As applied to those Indian communities it is significantly descriptive of a race and their habitations, which plainly distinguishes them from the nomadic tribes in their habits; as thus applied it has a popular and well-defined signification in New Mexico."

This last decision also recognizes the fact that the Pueblo Indians were citizens of the republic of Mexico and by opera-

tion of the treaty of 1848 became citizens of the United States.

The case last mentioned was carried to the Supreme Court of the United States and will be found in 94 U. S. 615. The United States Supreme Court says in that case:

> "Were the pueblo Indians, and the lands held by them, on which this settlement was made, within the meaning of the act of Congress of 1834, and its extension to the Territory of New Mexico, by the act of 1851? This question resolves itself into two others:—1. Are the people who constitute the pueblo or village of Taos an Indian tribe within the meaning of the statute? 2. Do they hold the lands on which the settlement mentioned in the petition was made by a tenure which brings them within its terms? * * * *"
>
> "The character and history of these people are not obscure, and occupy a well-known page in the story of Mexico, from the conquest of the country by Cortez to the cession of this part of it to the United States by the treaty of Guadalupe Hidalgo."
>
> "For centuries the pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. Since the introduction of the Spanish Catholic missionary into the country, they have adopted mainly not only the Spanish language, but the religion of a Christian church. In every pueblo is erected a church, dedicated to the worship of God, according to the form of the Roman Catholic religion, and in nearly all is to be found a priest of this church, who is recognized as their spiritual guide and adviser. They manufacture nearly all of their blankets, clothing, agricultural and culinary implements, etc. Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. The criminal records of the courts of the Territory scarcely contain the name of a pueblo Indian. In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and

the equal of the most civilized thereof. This description of the pueblo Indians, I think, will be deemed by all who know them as faithful and true in all respects. Such was their character at the time of the acquisition of New Mexico by the United States, and such is their character now."

"At the time the act of 1834 was passed there were no such Indians as these in the United States, unless it be one or two reservations or tribes, such as the Senecas or Oneidas of New York, to whom, it is clear, the eleventh section of the statute could have no application. When it became necessary to extend the laws regarding intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government."

"The Pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common) all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national tribal character, and not as individuals."

"If the pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and cannot for that reason be classed with the Indian tribes of whom we have been speaking."

A number of other decisions have been rendered both by the Federal Courts and the courts of the Territory of New Mexico, recognizing these Indians as citizens of the United States. It seems that it is impossible to make them out as anything but citizens of the United States, except that there seems to be a disposition in the Indian Bureau to make them Indians in accordance with the terms of the Indian Intercourse act; but when a person is once a citizen of the United States unless he renounces his citizenship and becomes a citizen of some other country or government, he retains his citizenship wherever he may be. These Indians have never done that. They are willing, it seems, for the government to appoint attorneys and agents to look after their general welfare and protect them from outside harm and injury, especially if they do not have to pay the expenses of such protection or such guardianship; and most any other person would be willing to do that. They being citizens of the United States and not in any manner subject to the Indian Intercourse Act, is a sufficient reason why the Government has no authority whatever to treat them as Indians under the Indian Intercourse Act.

On the organization of New Mexico as a Territory, in 1850, the first legislature passed an act declaring that all the pueblos in New Mexico should be corporations under the style of the "Pueblo of ————." (Compiled as Sec. 1875 C. L. 1897.) These Pueblos have a local government corresponding with that of a city government; they have a Governor who corresponds to a mayor; they have a casique who corresponds to a justice of the peace, who is the judicial officer; they have a consul who corresponds to a marshal; they have a war captain, who corresponds to a marshal, and are subject to all state (territorial) laws. They are not recognized in any sense of the word as savages or as Indians, which we designate as nomadic, but they claim to be christians, subject to law, and are and have been at all times subject to the laws of New Mexico. The Congress of the United States, in the 8th section of the Act of July 22, 1854, (10 stat. 308) recognizing the obligations imposed by the treaty of Guadalupe Hidalgo, made it the duty of the Surveyor General of New Mexico to

> "Make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants of the said pueblos, respectively, and the nature of their title to the land, * * * which report shall be laid before Congress for such action thereon as may be deemed just and proper with a

view to confirming bona fide grants and giving full effect to the treaty of 1848 between the United States and Mexico."

The public records of the Land Office and of the office of the Surveyor General of New Mexico show that these instructions were carried out and that patents from the Government of the United States were issued to most of the Pueblos, including the Santa Clara Pueblo now in question.

The status of the Pueblo Indians was also considered by the Supreme Court of New Mexico in the Pueblo Indian tax case, 12 N. M. 139. There the court held the lands of these Indians to be subject to taxation. In passing upon their status the court uses the following language:

"It is a matter of history, gathered by the writer from conversations with the early residents of the country, that these people were, after the treaty of Guadalupe Hidalgo and down to the organization of the territory, and perhaps down to the act of 1854, supra, regarded by the people as citizens, and possessed of all the rights of the same. They are purported to have participated in elections and held office in Pena Blanca and other places in the territory. They sat as grand and petit jurors in this same county of Bernalillo while Judge H. S. Johnson presided over the same, at one term of court at least. It is reported that through the efforts of one John Ward, an agent appointed for them, there was a tacit agreement reached between them and the people of the counties where they resided, that as long as they refrained from voting they should not pay taxes. They thus drifted out of the political life of the territory. But no such agreement, if made, was of any binding force, either upon the Indians or the territory. We conclude, therefore, that the Pueblo Indians of New Mexico are citizens of New Mexico and of the United States, hold their lands with full power of alienation and are, as such, subject to taxation."

In 1907 the Supreme Court of New Mexico again considered the subject in United States vs. Mares, 14 N. M., 1. In that case the question was directly presented as to whether a prosecution would lie under the Act of June 30, 1897, for the sale of intoxicating liquor to a Pueblo Indian. In that opinion Associate Justice Pope (now United States District Judge for the district of New Mexico) who rendered the opinion in the case at bar, uses the following language:

"The status of the Pueblo Indians of this Territory has been subject to very full consideration by this court and by the Supreme Court of the United States in a number of cases. United States vs. Varela, 1 N. M., 593; U. S. vs. Santistevan, 1 N. M., 583; Pueblo Indian Tax Case, 12 N. M., 139; United States vs. Joseph, 94 U. S., 619; quoted in ex parte Crow Dog, 109 U. S., 572; U. S. vs. Ritchie, 17 How., 525, 538. From these decisions the first two of which dealt with the very Pueblo here in question, their legal standing has been very definitely fixed. They have been judicially determined to be a people very different from the nomadic Apaches, Comanches, and other tribes, whose incapacity for self-government required both for themselves and for the citizens of the country the guardian care of the General Government.' They are not tribes within the meaning of the Federal intercourse acts prohibiting settlement upon the land of 'any Indian tribe.' They are not wards of the government in the sense that this term has been used in connection with the American Indian. While Congress has as a mere gratuity from time to time provided agents and special attorneys for them, it has never attempted thereby to reduce them to a state of tutelage or to put either them or their property under the charge or control of the Government or its agents. On the contrary, they hold their lands and property by complete and perfect title antedating the sovereignty of the United States and recognized by its unconditional patents issued to them decades ago. They have full power to alienate their lands, and these, in the absence of any act of Congress to the contrary, are subject like other property to taxation by the Territory. Finally, these Indians were, at the date of the treaty of Guadalupe Hidalgo, citizens of New Mexico and of the United States.

"This being the status of the Pueblo Indians, as fixed by the decisions of this court and of the Supreme Court of the United States, it only remains to be determined whether the sale of intoxicating liquors to them is within the prohibition of the act of January 30, 1897 (29 Stat., 506; 3 Fed. St. Ann. 384). That act makes it penal to sell or give intoxicants to 'any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under the charge of any Indian superintendent or agent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship.' It is a sufficient

answer to the present appeal to say that in our judgment the Pueblo Indians, as defined by the decisions above referred to, do not come within any of the three classes above referred to. The title to their lands is not held in trust by the Government; they are not wards of the Government, nor are they under the charge of any Indian superintendent or agent; they are not Indians over whom the Government, through its departments, exercises guardianship."

Upon the first proposition, we therefore urge the following conclusions:

(a) Under the Spanish rule the Pueblo Indians were on an equality with European Spaniards and entitled to all the rights of European Spaniards, subject, however, to certain restrictions upon their rights of alienation of property.

(b) Under the Mexican Government the Pueblo Indians were full fledged citizens upon an equality with all other citizens of the Mexican republic.

(c) Being citizens of the Mexican republic at the date of the treaty of Guadalupe Hidalgo, they became citizens of the United States, with all the rights, privileges and immunities of such citizenship.

Decisions relied upon:

U. S. vs. Ritchie, 17 *How.,* 525;

U. S. vs. Joseph, 94 *U. S.,* 614;

U. S. vs. Lucero, 1 *N. M.,* 422;

U. S. vs. Joseph, 1 *N. M.,* 593;

U. S. vs. Santistevan, 1 *N. M.,* 583;

U. S. vs. Mares, 14 *N. M.,* 1;

Pueblo Indian Tax Cases, 12 *N. M.,* 139;

De La O, vs. Pueblo of Acoma, 1 *N. M.* 226.

TREATING OF THE SECOND PROPOSITION.

"The lands of the 'Pueblo Indians' are not such lands as are known as 'Indian Country,' but are held by them in fee simple, segregated from the public domain, free from all conditions."

Are the lands of the Pueblo Indians known as "Indian country," or are they reservations for the use of the Indians with the title in the Government of the United States; or do

their lands occupy the same relation to these Indians and to the Government of the United States as the lands which are set apart for Indians under the Indian Intercourse Act? The defendant in error contends that the lands of the Pueblo Indians are not in any sense of the word such lands.

In 1689 the Spanish Government made grants to the various Indian Pueblos, which were within the then provinces of New Mexico. There were twenty-one or twenty-two of these pueblos. Each of the grants was made at about the same time and all of them were in about the same language. A copy of the granting papers to the Pueblo of Cochiti is set out in the case of United States vs. Lucero, 1 N. M., at page 445. The wording of this grant is identical with the wording of the grant to the Santa Clara Pueblo. It will be noted that the pueblos are spoken of in the grant made to them as being rebels against the Government, and not in any sense of the word as being savages, savage Indians or barbarous Indians. These grants were recognized by the Mexican republic upon Mexico declaring its independence in 1821. Under the Spanish regime the Indians were prohibited from selling their real estate without a license from the proper authority. This restriction was placed upon them by a decree of the Audiencia published upon the 23rd of February, 1781, by D. Martin Mayorga, the Viceroy. (Hall's Mexican Law, Sec. 161.) This restriction undoubtedly continued down to a short time prior to the independence of Mexico. We find, however, that in 1811 the Spanish government placed the Indians upon a complete equality with European Spaniards.

> Proclamation by Commandant General Nemecio Salcedo, promulgating a royal decree, dated March 24, 1811. (Quoted *supra*, to the first proposition.) Decree by Commandant General of the Internal Provinces, promulgating a decree of the Cortes of February 9, 1811. (Quoted in full, *supra*, to the first proposition.)

While the two decrees above referred to do not necessarily remove the restrictions upon the right of alienation of property, they clearly indicate that the Spanish government had come to look upon the Pueblo Indians as upon a practical equality with other residents of the then provinces of New Mexico.

As hereinbefore stated under the first proposition, the two decrees above referred to and the decree of March 13, 1811, were decrees of the Cortes of Spain during the regency or interregnum resulting from the conquest of the Spanish Peninsula during the Napoleonic wars. In the Pueblo Indian tax

case, 12 N. M. 139, the court, erroneously we think, refers to the decree of March 13, 1811, as exempting the Pueblo Indians from taxation. The decree of March 13, 1811, cannot be so construed. It exempts the Indians from paying tribute. As we understand the Spanish laws, there was no such thing as taxes as we now know them, but the people in the Spanish colonies paid tribute to the crown or government. This is the exemption which is granted to the Indians in the decree of March 13, 1811.

After the acquisition of New Mexico by the United States Congress directed the Surveyor General of New Mexico to make inquiry into all grants of the Spanish and Mexican government and to report to that body on their validity. Such investigations and reports were made with reference to the Santa Clara Pueblo and, by an Act of Congress of December 22, 1858, (11 Stat. 374) the title of the Pueblos to their lands was confirmed, and the Commissioner of the General Land Office ordered to

> "Issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said Surveyor General, and cause a patent to issue therefor, as in ordinary cases to private individuals; Provided that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of such lands, and shall not affect any adverse valid rights, should such exist."

In the case of United States vs. Joseph, 94 U. S., 614, this court, in affirming the judgments of the Supreme Court of the Territory of New Mexico, held that the Pueblo Indians of New Mexico hold complete title to their land and that they were not Indian tribes in the meaning of the Intercourse Act of 1834. Quoting with approval certain expressions reproduced from the Lucero case, this court said in its opinion:

> "When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes and other tribes, whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the General Government."
>
> "The Pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries be-

fore, their willing submission to all the laws of the Mexican Government, the full recognition by that Government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our Government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the Governments, State and National, deal, with a few exceptions only, in their national or tribal character, and not as individuals."

"If the Pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and can not for that reason be classed with the Indian tribes of whom we have been speaking."

"We find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the Government."

"It is this fixed claim of dominion which lies at the foundation of the act forbidding the white men to make a settlement on the lands occupied by an Indian tribe."

"The Pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the Government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican Government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States."

"With the purpose of carrying into effect this provision of that treaty, Congress directed the Surveyor General of New Mexico to make inquiry into all grants

of the Spanish and Mexican Governments, and to report to that body on their validity. Such reports were made from time to time, one of which included and recommended for confirmation this claim of 'the Pueblo of Taos, in the county of Taos,' not the Pueblo Indians of Taos, but the Pueblo of Taos; and by an act of Congress of December 22, 1858, 11 Stat., 374, the title was confirmed, and the Commissioner of the Land Office ordered to 'issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said Surveyor General, and cause a patent to issue therefor, as in ordinary cases to private individuals: Provided, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

In the Pueblo Indian tax case, 12 N. M., 139, the Supreme Court of New Mexico, after citing the case of United States vs. Lucero, points out that the Spanish conquerors found them

"a peaceful, industrious and civilized people, living in towns (pueblos) and following agricultural and pastoral pursuits. In 1689, and within a few years subsequent, the Spanish Government granted them their lands. So long as they remained under the Spanish rules, certain restrictions were placed upon the alienation of their property. Halls Mexican Law, Sec. 160-161. As late as March 13, 1811, they were exempted from taxation. Halls Mexican Law, Sec. 169. They seem to have been considered by the Spanish as wards of the Government and entitled to special privileges and protection."

"But a complete change took place in the status of these people when Mexico threw off the Spanish yoke. Among those engaged in that struggle for independence, this Aztec race far outnumbered the Mexicans, and its success was due in a large measure to their efforts. It was but natural and fitting that in the formation of the new government they should take a prominent, if not a leading, part, and that they should be placed upon an equal footing as to all civil and political rights. * * * We had then, at the date of the treaty of Guadalupe Hidalgo, whereby we acquired this territory, a people possessed of all the powers, privileges and immunities of any other citizens of Mexico, and they came to us so endowed as much as any other class of citizens. This, necessarily,

and independent of the provisions of the treaty of Guadalupe Hidalgo, which so carefully guards the civil rights of all Mexican citizens within the ceded territory, carried with it the right to take, hold and dispose of their property. Their right of alienation of their property has never been directly passed upon by the Supreme Court of the United States. The court, in United States vs. Ritchie, *supra,* declined to express an opinion on this point, it not being involved. This court, in United States vs. Lucero, *supra,* page 448, stated that the Pueblo of Cochiti had sold a portion of their lands where the town of Peña Blanca stands, and that the sale was recognized as valid by the Mexican Government; but we have been unable to verify the court's reference to the decrees of the Mexican republic. But it seems clear that they have such right. No limitation on the power is to be found, either in the laws of Mexico, the United States or the Territory. The right of alienation is one of the chief elements of property values, and is possessed by all citizens alike." * * * * "But, in view of the conclusions reached by this court in United States vs. Lucero, *supra,* United States vs. Santistevan, 1 N. M., 583, and United States vs. Joseph, id., 593, and the reasoning there employed, as well as the reasoning in United States vs. Ritchie, *supra,* and United States vs. Joseph, 94 U. S. 614, we have no doubt that the Pueblo Indians in this territory were citizens of Mexico and at the time of the ratification of the treaty of Guadalupe Hidalgo, possessed of all the rights of any other citizens, including the right of alienation of their lands."

After the foregoing decision was handed down the Pueblo Indians of New Mexico sent a delegation to Washington and at their behest Congress passed the act of March 3rd, 1905, 33 Stat. Ch. 1479, exempting the Pueblo Indians from taxation.

"As far back as 1571, in the reign of Philip II of Spain, the Indians were allowed to sell their real estate and personal property in the presence of the judge; the former on thirty and the latter on nine days' notice: See Ordenanzas de Tierras y Aguas, 110. In 1642, under Philip IV of Spain, a total prohibition existed and the Indians could not sell. See id., 105. In 1781, the Indians were prohibited from selling lands without first obtaining the sanction of the Supreme Government, id. 106. Over half a century ago, this identical Pueblo of

Cochiti sold Peña Blanca, the present county seat of Santa Ana county, and the Supreme Court of Guadalajara, 24th of October, 1816, annulled the sale of the Cochiti Indians to that place: See id. 109-110. It is proper for the court to say that the question of the validity of this sale by the Cochiti Indians of the locality, where the town of Peña Blanca now is, and has been for over fifty years, was presented to the Supreme Government of Mexico after the separation from old Spain, and was by it affirmed."

(U. S. vs. Lucero, 1 N. M., at p. 448.)

So far as we have been able to discover there is but one reported case holding that the Pueblo Indians, under the Mexican government, did not have the right to sell their real property. This is the case of Suñol y Hepburn, 1 Calif., 254. In this case the majority opinion of the court, after referring to the royal ordinances and decrees, beginning with the decree of Philip II, made on the 24th day of March, 1571, and concluding with the decree of Charles III, in the year 1781, (all being royal decrees of Spain), proceeds:

"These are some of the provisions of Spanish and *Mexican* law, touching the disability of Indians to transfer their lands. All of them manifest a great anxiety which the rulers of Mexico have felt to collect the natives together in communities and subject them to municipal regulations. * * * "

It is evident from the language used that the court is arguing from a false premise. None of the decrees cited or referred to had anything to do with the Mexican Republic. Further on in the same opinion, the court uses the following language:

"The constitutions referred to (certain decrees of the Cortes of 1812-13, and of the Mexican constitutions of 1836-1843), it is said, by conferring upon the Indians the character of Mexican citizens, thereby removed all restraints on the alienation of lands by them. But this argument proves too much. Infants, idiots, lunatics, spend-thrifts and married women are also Mexican citizens, and yet it can scarcely be claimed that those constitutional provisions were intended to remove all disabilities, under which they are placed by law, and enable them to contract and alienate their property with-

out the intervention of Tutor or Curator, committee or guardian. So with the Indians. *Though lifted to the condition of Mexican citizens,* they must still contract, and convey property, in the mode prescribed for them by law. It is further contended that by virtue of the Plan of Iguala, in the circular of January 11, 1821, which declared that all inhabitants of Mexico were equal in rights, without distinction of Europeans, Africans, or Indians, the disabilities of the latter class to transfer their lands without control were removed."

"The same objection to this argument arises, which has been noticed in respect to that founded on the constitutions referred to. It proves too much. * * * "

In a dissenting opinion, Chief Justice Hastings takes the contrary view, reaching the same conclusions as this court and the Supreme Court of the Territory of New Mexico in the cases herein cited:

"The Indian Roberto was a citizen of the republic, enjoying all the rights and privileges of any other citizen of Mexico, and was eligible to office according to his merits and virtues. This is admitted. Yet it is said that a Mexican citizen, because he happens to be of Indian blood, or an emancipated Indian, shall not, and cannot, transfer his property and real estate, without the permission, and under the direction of a judicial officer, as if he were an insane person, lunatic or infant. It appears evident that to be a citizen, enjoying equal rights with other citizens of the republic, the Indian must enjoy the right to alienate his property without restraint—the right to think and act for himself. It is a matter of history that some of the wealthiest citizens of this state, at the present time, are either Indians of full or half blood. They are men of wealth, intelligence and education, and yet by the Plan of Iguala, as well as by the principles of the republican institutions of Mexico, they have no superior social rights to the Indian Roberto nor any higher legal privileges.

"The policy of the Royal Government of Spain, regulating the intercourse with the Indians, humane as it may have been, differed widely from the system of trade and intercourse with the Indian tribes adopted by the Government of the United States. The United States have never elevated the Indian to an equality in rights and privileges with the white race; if so, trade and traffic in property, real and personal, would be free, and not

positively inhibited by the National Legislature. Entertaining these views, and governed by the law as I understand it, I believe the following conclusions to be correct. * * * * *"

3rd. That all restraints upon Indians, in the alienation of their real property, appear to have been abolished." (Dissenting opinion Suñol y Hepburn, p. 293.)

In the same dissenting opinion, Chief Justice Hastings quotes from 1 Febrero Mejicano, page 96, Sec. 48, as follows:

"In the ancient laws other distinctions are made between men on account of their races and colors, and of those the principal was the one between Indians and Spaniards. So odious a classification has not existed in the republic since it declared itself sovereign and independent, and principally since the Plan of Iguala declared all inhabitants to be equal in rights without distinction between Europeans, Africans and Indians."

"In the same work, page 257, Sec. 1, it is said, 'anciently the Indians also were reputed minors under the age of five and twenty years, although they were above that age; but now it is expressly declared that, allowing them to be equal to other citizens, they are no longer in a state of minority."

CONCLUSIONS UNDER THE SECOND PROPOSITION:

The Pueblo lands are not, and never have been, held in trust by the Federal Government.

The Pueblo Indians are not, and never have been, wards of the Federal Government, nor are they under the charge of any Indian superintendent or agent.

The Pueblos are not Indians over whom the Government, through its departments, has ever exercised, or now exercises, guardianship.

While there were certain restrictions upon the right of the Pueblo Indians to sell their property in real estate, under the Spanish regime, these restrictions were entirely removed under the Mexican Government. The Pueblos held their lands, with all the rights of alienation, by a fee simple title at the date of the treaty of Guadalupe Hidalgo.

Their title was fully recognized by the United States Government, all claims of the Government having been quitclaimed to the Pueblo Indians in 1858.

TREATING OF THE THIRD PROPOSITION:

"The provisions of the Enabling Act, (The Act of June 20, 1910), and of the Constitution of the State of New Mexico, attempting to bring the Pueblo Indians and their lands within the terms of the 'Intercourse Act' are a nullity."

It is clear from the discussion of the first and second propositions that the Pueblo Indians, prior to the passage of the Enabling Act (Act of June 20, 1910), were not within the provisions of the act of January 30, A. D. 1897, 29 Stat. 506. They were not wards of the Government; they were not in charge of any agent; their lands were not held in trust by the Government, nor did the Government exercise any rights of guardianship over them, nor had the Government ever negotiated any treaty with them as an Indian tribe.

It is not necessary at this time to enter into any discussion of whether or not Congress could have legislated for the Pueblo Indians along the lines of the proisvions of the act of January 30, 1897. It is sufficient to say that Congress did not so legislate while New Mexico was a territory. The Federal Government is a government of delegated powers. All powers not so delegated are reserved to the states. From what constitutional source, then, proceeds the power of Congress to legislate as to the Indians? The question has been fully answered by Circuit Judge Smith, in the case of United States Express Company vs. Friedman, 191 Fed., 673. He classifies the congressional power to legislate for the Indians as flowing from one of five sources: 1st, The treaty-making power; 2nd, the power to regulate interstate commerce; 3rd, The power to regulate commerce with Indian tribes; 4th, The ownership as sovereign of lands to which the Indian title has not been extinguished; 5th, The plenary authority arising out of the Nation's guardianship of the Indians as an alien but dependent people.

The origin of this power to legislate for the Indians is also considered in the case of United States vs. Boss, 160 Fed., 132. Referring to the liquor statute of January 30, 1897, the court says:

> "If it is to apply within a state it must be because of the status of the Indians for whose protection it was enacted, or of the locus of the forbidden act as being on a reservation."

Considering the Pueblo Indians in the light of the case of United States vs. Friedman, we find:

The Pueblo Indians of New Mexico have never been parties to any treaty with the United States, nor has it ever been claimed they were proper subjects for a treaty.

They cannot be said to come within the second source of power, viz.: to regulate interstate commerce, as the case at bar does not involve any question relating to interstate traffic.

The power cannot be sustained as an exercise of the right of Congress to regulate commerce with the Indian tribes. The Pueblo Indians are not tribes within the meaning of the constitution.

The power cannot be said to flow from the ownership of lands to which the Indian title has not been extinguished. It has been clearly shown by the discussion of the second proposition that the American Government never owned the lands in question; nor can this power flow from what has been called "plenary authority arising out of its guardianship of the Indians as an alien, but dependent people." As we have heretofore seen, the Pueblos have never been wards of the United States Government. While it is true they occupied that position with reference to certain property rights under the Spanish regime, by the independence of the Mexican nation, in 1821, they became citizens of Mexico with all the rights of any other citizen, and when New Mexico became a part of these United States, by the treaty of Guadalupe Hidalgo in February, 1848, they came under our sovereignty as citizens and not as wards. There is not a single act of theirs, either of the Indians or of our Government, since the treaty of Guadalupe Hidalgo, which has changed their status so as to make them subject to National guardianship, or make them an alien but dependent people.

It is true that Congress has at various times legislated in behalf of the Pueblo Indians within the Territory of New Mexico. In 1854, Congress made an appropriation for the purpose of presenting them with agricultural implements and farming utensils, (10 Stat. 330.) In 1857, Congress made an appropriation for the expense of surveying and marking the boundaries of the Pueblo grants (11 Stat. 184.) Within recent years an attorney has been provided for them (35 Stat. 799.) Congress also, after the decision of the Pueblo Indian tax case, 12 N. M., 139, relieved them from the payment of any taxes to the Territory of New Mexico (33 Stat. 1069.)

These congressional acts, however, cannot be said to make the Pueblo Indians wards of the National Government. Rather, they are mere gratuities given by the Federal Government to a certain class of citizens residing within a terri-

tory. The legislation above referred to and the appropriations made therein can all be sustained under the constitutional power of Congress to appropriate public moneys or in the exercise of its power to legislate for the territories. Each and every one of the acts above referred to could have been passed for the benefit of any other class or group of citizens within the Territory of New Mexico.

The regulation of the sale of intoxicating liquors within a state is one of the most common and significant exercises of the police power.

> "In this republic there is a dual system of government, national and state. Each within its own domain is supreme and one of the chief functions of this court is to observe the balance between them, protecting each in the power it possesses and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction. It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purpose of revenue and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a state whose laws forbid its sale, and neither does a license from a state to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the Federal Statute. License cases, 5 How., 504; McGuire vs. the Commonwealth, 3 Wall., 387; License tax cases, 5 Wall, 462. Now, the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation and not divided between the two." (Matter of Heff, 197, U. S., 488.)

In the same case, it is further said:

"But it is contended that although the United States may not punish under the police power the sale of liquor within a state by one citizen to another, it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of Sec. 8, Article 1 of the Constitution, which empowers Congress to 'regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress having power to regulate commerce between the white man and the Indians continues to retain that power, although it is provided that the Indians shall have the benefit of and be subject to the civil and criminal laws of the state and shall be a citizen of the United States and therefore a citizen of the state. But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate its action and resume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian blood in his veins, he is to be forever one of the special class over whom the general government may in its discretion, assume the rights of guardianship which it has once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

(Matter of Heff cited *supra.*)

The court concludes as follows:

"But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal con-

> trol thus created cannot be set aside at the instance of the government *without the consent of the individual Indian and the state,* and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumberance, or the further fact that it guarantees to him an interest in tribal or other property."
>
> (Matter of Heff cited *supra.*)

While it is undoubtedly true that the scope of the Heff case has been somewhat narrowed by later cases, the decision has not been in any way limited upon the point here material. United States Express Company vs. Friedman, 191 Fed., 673-680; Moshier vs. United States, 198 Fed. 54. The principle for which we are contending in the case at bar, as laid down in the matter of Heff, is strengthened by the decisions in the following cases:

> Keller vs. U. S., 213 U. S., 147;
>
> Ward vs. Racehorse, 163 U. S., 504 and cases cited;
>
> Coyle vs. Oklahoma, 221 U. S., 559.

In the trial court it was urged by the government that the stipulations of the Enabling Act and of the state constitution that Pueblo lands shall constitute Indian country and shall be subject to the exclusive jurisdiction of the United States, is valid upon the following reasons: That Congress is vested with plenary power to legislate as to the Territory and, therefore, has the constitutional right to segregate, in forming a new state, such areas as it sees fit, and to assume entire control of these latter insofar as this does not take from the owners of the land the right to possess and enjoy it as citizens of the United States; and that in making this provision as to Pueblo Indians lands it has acted within such claim of constitutional power.

It is undoubtedly true that Congress had the authority to legislate as to the territories as it saw fit prior to the creation of the territory of New Mexico into the State of New Mexico. Prior to statehood Congress had not legislated with reference to the Pueblo lands except to exempt them from taxation. By the provisions of the Enabling Act Congress sought, without the consent of the individual Pueblo, to repudiate its former grant of citizenship to the Pueblo Indian and to assume a guardianship

over the Pueblo Indian, which right had never rested in the Federal Government, and thereby to prevent the Pueblo Indian, upon the incoming of New Mexico as a state, from enjoying the benefit of the laws of the state, and to release him from obligations of obedience thereto.

If the Government had had any title to the lands of the Pueblo Indians prior to the admission of New Mexico as a state, it might be successfully contended that they had a right to segregate said lands of the Pueblos from the new state and declare them to be "Indian Country," but, as we have seen, the Federal Government *never had any title* to these lands; by the treaty of Guadalupe Hidalgo the Pueblos had been fully recognized as citizens of the United States, and yet by the provisions of the Enabling Act, without the consent of the individual citizen, Congress seeks to deprive him of the rights and privileges of national, and therefore state, citizenship.

This now brings us to a consideration of the provisions of section 2 of Article 21 of the Constitution, which was included in the constitution of the State of New Mexico under the provisions of the Enabling Act, as were the provisions of sections 1 and 8 of Article 21 of the constitution of the State of New Mexico.

In section 2 it is provided that the people inhabiting the State of New Mexico do agree and declare that they forever disclaim the right and title to all lands lying within the boundaries of the state owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired from the United States or any prior sovereignty, and that such lands, until the title of the said Indians shall be extinguished shall remain subject to the disposition, and *under the absolute jurisdiction and control of the Congress of the United States*, and also that all such lands shall be exempt from taxation by the state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe. These provisions of the New Mexico constitution were placed in the constitution of the State of New Mexico practically under duress. It will be noted that Article 21 begins with the words "in compliance with the requirements of the Act of Congress, entitled," etc., and it is under that heading and preamble that the clause is inserted in the constitution of the state, showing that what was done was in compliance with the requirements of the Enabling Act so that New Mexico might be admitted as a state, otherwise New Mexico would not have been admitted.

The constitution of the United States, Article 9, states:

> "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people;"

and Article 10 states:

> "The powers not delegated to the United States by the constitution nor prohibited by it to the states, are reserved to the states respectively or to the people."

There is no power conferred by the Constitution of the United States upon the United States authorizing it to undertake to regulate, manage and control private property and the administration of private property in any one of the states. Such matters are left to the state and its legislative bodies alone.

We have seen in the discussion of the status of the Pueblo Indians that they are not Indians within the meaning of the "Intercourse Act," and that the Act of 1834 did not include the Pueblo Indians, but referred merely to what might be designated the wild, savage and nomadic Indians. We have also seen that the act of 1897 did not include the Pueblo Indians under a territorial form of government. In other words, the term "Pueblo Indians" has no greater significance than the expressions Spanish-American, German-American, or Irish-American. The mere use of the term "Pueblo Indians," in referring to these people, cannot be said to deprive them of that greater and higher right: to be classified as citizens of the United States and therefore of the State of New Mexico.

In the trial court, counsel for the Government contended that Congress had full power to legislate as it pleased concerning the inhabitants of the territory, provided such legislation didn't deprive them of some property or vested right or personal liberty without due process of law, citing thereto Thompson vs. Utah, 170 U. S. 343; First National Bank vs. Yankton, 101 U. S., 129. It was contended under the authority of the foregoing cases that Congress had full power to legislate concerning the Pueblo Indians prior to statehood, within the limitations laid down in the two cases cited *supra*. It is true that Congress did pass certain legislation affecting the Pueblo Indians prior to statehood, viz.: in furnishing them free schools, free legal counsel, superintendents, certain farming tools, machinery and supplies and also the Act of the 28th Congress, exempting them from taxation. The validity of any such legislation was never questioned, and it is not proper in this discussion to consider either the propriety or

the validity of such legislation. Counsel for the Government in the trial court, contended that the effect of the provisions of the Enabling Act and of the New Mexico Constitution were to segregate out of the new state thereby created the lands held and occupied by the Pueblo Indians at the date of the admission of New Mexico into the Union. In support of this proposition they cited Langford vs. Monteith, 102 U. S., 145; Harkness vs. Hyde, 98 U. S., 477. In the case of Langford vs. Monteith this court, in referring to the opinion in Harkness vs. Hyde, uses the following language:

> "The principle announced in that case is sound, viz.: that when, by the act of Congress organizing a territorial government, lands are excepted out of the jurisdiction of the government thus brought into existence, they constitute no part of such territory, although they are included within its boundaries. Congress, from which the power to exercise the new jurisdiction emanates, has undoubted authority *to exclude therefrom any part of the soil of the United States or of that whereto the Indians have the possessory title, when, by our solemn treaties with them, a stipulation to that effect has been made.*
>
> "The applicability of this doctrine to the jurisdiction of places in which the United States have conducted permanent forts, arsenals, etc., before such governments are organized will be seen at once. Congress has also acted on this principle on the admission of new states into the Union. The act for the admission of Kansas, (12 Stat., 126) after describing its exterior boundaries and declaring that the new state is admitted into the Union on an equal footing with the original states, in all respects whatever, adds that nothing contained in the Constitution of the state shall be construed "to include any territory which by treaty with such Indian tribe is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of the state of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said state.' Between the United States and the Shawnees, a treaty then existed by which the United States guaranteed that their lands should never be brought within the bounds of any state or territory, or subject to the laws thereof. In United States vs. Ward, (1 Woolw., 1) the circuit court held that the state courts had no jurisdiction in the lands of the

> Shawnees, and this was repeated in United States vs. Stahl. (id. 192.)"

No such provision appears in the Enabling Act of June 20, 1910, (36 St. 557) as appears in the act for the admission of Kansas. In the Kansas Act the boundaries of the new state were defined. In the New Mexico act the boundaries are those of the territory of New Mexico. In the Kansas act there is a specific statement and declaration that certain Indian lands shall constitute no part of the State of Kansas. No such provision is contained in the New Mexico statute with reference to the lands of the Pueblos. They are within and a part of the State of New Mexico. They were not excepted out of the territory which Congress created into the new State of New Mexico. We have no dispute with the proposition that Congress, in creating the State of New Mexico, might have made different boundaries for the new state, or even might have created two or three new states out of the territory included within the old territory of New Mexico. Congress might even have created a state out of a part of the old territory of New Mexico and left the remainder still with a territorial form of government subject to its control. Nor do we question the right of Congress in creating a new state to carve out from the new state the lands upon which the government arsenals, forts, cemeteries, sanitariums and other government institutions are located.

We do not think, however, that there is a reported case to be found anywhere which will sustain the proposition advanced in the trial court by counsel for the Government, that the Federal Government, in creating a new state, can arbitrarily segregate out of the state privately owned lands to which the United States has no title or claim whatsoever, and say that these lands shall be subject to the laws of the United States. In the New Mexico act, Congress does not even attempt to segregate these lands out of the new state. There is no specific statement to that effect. The provision of the Enabling act is

> "and that until the title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

Congress, having parted with all claim which the Federal Government had to these lands as far back as 1858, certainly cannot assume any jurisdiction or control over these lands,

or dispose of the same or put any restrictions upon the disposal of the same without coming within the clear prohibitions of the Federal Constitution.

The power which Congress attempted to exercise in the first and eighth sub-divisions of section 2 of the Act of June 20, 1910, so far as it affects the Pueblo Indians, must be traced to some definite constitutional authority. We have seen that it cannot emanate from any of the sources referred to in the case of United States Express Company vs. Friedman, cited *supra*. The power which Congress attempted to exercise in the second sub-division of section 2 of the act of June 20, 1910, must likewise be traced to some definite constitutional provision. The cases of Harkness vs. Hyde and Langforth vs. Monteith, as well as the later cases which have cited and approved the doctrine laid down in these cases, in no instance go to the extent of holding that Congress can carve out of a new state privately owned lands and say, that while they are within the new state for certain purposes, for other purposes they shall be subject to Federal control.

In the late case of Coyle vs. Oklahoma, 221, U. S. 559, this court has discussed the powers of Congress to impose conditions in admitting new states, classifying them as follows:

> "We must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject; and, third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of State power."

The court proceeds:

> "The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the State after its admission, which overrides any subsequent State legislation repugnant thereto.
>
> "The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly State powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of

inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate at the time of its admission? The argument is, that while Congress may not deprive a State of any power which it possesses, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent at least of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union, and the constitutional duty of guaranteeing to 'every State in this Union a republican form of government.' The position of counsel for the appellants is substantially this: That the power of Congress to admit new States and to determine whether or not its fundamental law is republican in form are political powers, and as such uncontrolable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon 'an equal footing with the original States.'

It is then further said:

"But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit States. * * * * *"

"This Union was and is a union of States, equal in power, dignity, and authority, each competent to exert that residum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and second, that such new States might not exercise all of the powers which had not been dele-

gated by the Constitution, but only such as had not been further bargained away as conditions of admission."

The court further says:

"It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Williamette Bridge Co. vs. Hatch, 125 U. S., 1, 9. Pollard's leases vs. Hagan, supra.

No such question is presented here. The legislation in Oklahoma enabling act, relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all it must be implied from the power to admit new States. If power to impose such a restriction upon the general and undelegated power of a State be conceded as implied from the power to admit a new State, where is the line to be drawn against restrictions imposed upon new States?"

The court concludes in the following language:

"Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she can not."

New Mexico complied with all the provisions required by the Enabling Act preliminary to admission. There are also a number of compacts and provisions for affirmative legis-

lation intended to operate *in futuro*, all of which are within the scope of the conceded powers of Congress over the subject. For example, the waiver by the new state of any claim of right to lands occupied by Indian tribes, the waiver of any right or claim to the public lands of the United States, the compact and agreements with reference to taxation of lands and property of non-residents, and similar provisions. All of these are easily traceable to some well known provision of the federal constitution. The provisions in the compact referring to the Pueblo Indians, however, come clearly within the third class referred to by this court in Coyle vs. Oklahoma, cited *supra*. The powers which Congress attempts to retain to itself in the first and eighth sub-divisions of section 2 of the Enabling Act clearly relate to matters of internal police regulation. Can Congress deprive New Mexico, by a compact declared to be irrevocable, of its right to regulate its own internal police affairs? This question has been squarely before this court in the case of Keller vs. United States, 213 U. S., 147. (See also Ward vs. Race Horse, 163 U. S., 504, and cases cited therein.) If Congress had no power to control the location of the capital of the new state of Oklahoma, it has no power to restrict the right of New Mexico to administer its own internal police affairs.

> "In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing . . . every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own Constitution. Another general principle, based on the express words of the constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes, Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes."
>
> (Dick vs. United States, 208 U. S., 340.)

In discussing the power of Congress in the case just cited, this court holds the same to be

> "Based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians and not inconsistent in any substantial sense with the constitutional principle that a new State comes into the Union upon entire equality with the original States. * * * * *"
>
> "If this case depended alone upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words 'Indian country' to embrace any body of territory in which at the time the Indian title had been extinguished and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of government, was full and complete. Bates vs. Clark, 95 U. S., 204;
>
> Ex parte Crow Dog, 109 U. S., 556, 561."

Counsel for the United States, in the trial court, also cited:

The Kansas Indians, Wall, 737;

United States vs. Forty-three Gallons of Whiskey, 93 U. S., 188;

United States vs. Holiday, 3 Wall, 409;

United States vs. Farrell, 110 Fed., 149;

United States vs. Allen, 179 Fed., 13;

Bowling vs. United States, 191 Fed., 19;

United States vs. Celestine, 215 U. S., 278;

United States vs. Sutton, 215 U. S., 291;

Tiger vs. Western Investment Co. ,221 U. S., 286;

Hallowell vs. United States, 221 U. S., 323;

as showing the extent to which the federal courts have gone in upholding the power of Congress over the Indians and Indian tribes. A careful reading of these cases, however, will disclose that the source of the power exercised by Congress can be clearly traced to one of the well recognized constitutional provisions hereinbefore referred to. The recent case

of Clairmont vs. United States, 225 U. S., 551, refers to the Dick case, points out the source of the federal power there upheld, and approves the doctrine there laid down. In some of the cases just cited the jurisdiction of the Federal Government was upheld under the power of Congress to regulate commerce between the states or with the Indian tribes. In other cases the jurisdiction was sustained under the power flowing from the Government's right to administer its own property.

The powers which the Enabling Act and the New Mexico constitution attempt to confer upon Congress to regulate the affairs of the Pueblo Indians, do not flow from any of the sources mentioned in any of the cases cited.

If Congress had no power to impose these restrictions upon New Mexico, the State of New Mexico had no right to surrender any of the powers which are expressly reserved to the States by the federal constitution.

Coyle vs. Smith, cited *supra*;

Permoli vs. First Municipality, 3 How., 589;

Pollard's Lessee vs. Hagan, 3 How., 212;

Texas vs. White, 7 Wall., 700;

Ward vs. Race Horse, 163 U. S., 504.

It is therefore submitted that the ruling of the trial court upon the demurrer to the indictment was correct.

A. B. RENEHAN,
Attorney for the Defendant.

UNITED STATES *v.* SANDOVAL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

No. 352. Argued February 27, 1913.—Decided October 20, 1913.

Congress has power to make conditions in an Enabling Act, and require the State to assent thereto, as to such subjects as are within the regulating power of Congress. *Coyle* v. *Oklahoma*, 221 U. S. 559, 574.

Such legislation, when it derives its force not from the resulting compact but solely from the power of Congress over the subject, does not operate to restrict the legislative power of the State in respect to any matter not plainly within the regulating power of Congress. *Coyle* v. *Oklahoma*, 221 U. S. 559, distinguished.

The status of the Pueblo Indians in New Mexico and their lands is such that Congress can competently prohibit the introduction of intoxicating liquors into such lands notwithstanding the admission of New Mexico to statehood.

The power and duty of the United States under the Constitution to regulate commerce with the Indian tribes includes the duty to care for and protect all dependent Indian communities within its borders, whether within its original limits or territory subsequently acquired and whether within or without the limits of a State. *United States* v. *Kagama*, 118 U. S. 375.

Congress may not bring a community or body of people within range of its power by arbitrarily calling them Indians; but in respect of distinctly Indian communities the questions whether and for how long they shall be recognized as requiring protection of the United States are to be determined by Congress and not by the courts.

In reference to all political matters relating to Indians it is the rule of this court to follow the executive and other political departments of the Government whose more special duty it is to determine such affairs. If they recognize certain people as a tribe of Indians, this court must do the same.

Quære, and not decided, whether the Pueblo Indians of New Mexico are citizens of the United States.

The fact that Indians are citizens is not an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people.

Congress has power to exclude liquor from the lands of the Pueblo Indians, for although the Indians have a fee simple title, it is communal, no individual owning any separate tract. *United States* v. *Joseph*, 94 U. S. 614, distinguished.

It was a legitimate exercise of power on the part of Congress to provide in the Enabling Act under which New Mexico was admitted as a State against the introduction of liquor into the Indian country and the prohibition extends to lands owned by the Pueblo Indians in New Mexico.

198 Fed. Rep. 539, reversed.

THE facts, which involve the validity, as applied to the Pueblo Indians of New Mexico, of the act of January 30, 1897, as supplemented by the Enabling Act of June 20, 1910, in regard to the introduction of intoxicating liquor into Indian country and the status of the Pueblo Indians of New Mexico, are stated in the opinion.

Mr. Solicitor General Bullitt, with whom *Mr. Louis G. Bissell* was on the brief, for the United States:

Congress had the power in admitting New Mexico to statehood to impose conditions relative to the Pueblo Indians within its borders.

Conditions imposed by Congress upon new States

through their enabling acts are valid when they result from the exercise of powers conferred upon the Federal Government. *Coyle* v. *Oklahoma*, 221 U. S. 559.

The Federal power over Indians is of this character. *Coyle* v. *Oklahoma*, 221 U. S. 559; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *Ex parte Webb*, 225 U. S. 663.

This power permits prohibitions against the sale of intoxicants to the Indian wards of the United States, its introduction upon Indian lands and the exemption of such lands from state taxation. *Choate* v. *Trapp*, 224 U. S. 665; *The Kansas Indians*, 5 Wall. 737; *United States* v. *Dick*, 208 U. S. 340; *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Rickert*, 188 U. S. 432.

The Pueblo Indians of New Mexico are Indians and, therefore, subject to the constitutional power of Congress over Indians.

Federal jurisdiction cannot be excluded merely by implication. *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Celestine*, 215 U. S. 278.

Federal jurisdiction over the Pueblo Indians was not precluded or ousted by any of their four essential characteristics. Their organization in villages is consistent with Federal jurisdiction. Pueblo Indians are tribal Indians within the true meaning of the words "Indian Tribes" in the "Commerce Clause."

As to the meaning of "Indian Tribes" see Articles of Confederation, Art. IX; 1 Story, Const. (1873), §§ 1097–98; Farrand, Records of Const. Conv. Form of Pueblo Indian organization; Report by Bandelier to Archeol. Inst. of Amer.; Report No. 23—Bureau of Amer. Ethnology, pages cited.

There is a presumption in favor of jurisdiction. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; Willoughby, Constitution, § 150; 1 Kappler, Indian Laws and Treaties, p. 880.

Federal jurisdiction also arises by implication from the Indians' need of governmental protection. *Heckman* v. *United States*, 224 U. S. 413; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Kagama*, 118 U. S. 375.

The Pueblo Indians require protection. They were wards of Spanish and Mexican governments under Spanish laws. Report by Bandelier, *supra; Sunol* v. *Hepburn*, 1 California, 254; *United States* v. *Pico*, 5 Wall. 536; *United States* v. *Ritchie*, 17 How. 575.

Authorities cited in opposition to Federal jurisdiction: *United States* v. *Joseph*, 94 U. S. 614; *United States* v. *Lucero*, 1 New Mex. 422; *United States* v. *Santistevan*, 1 New Mex. 583, involved construction of a statute only and not the present paramount reason for exercise of Federal jurisdiction over Indians, i. e., protection of Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *Matter of Heff*, 197 U. S. 488; *Jones* v. *Meehan*, 175 U. S. 10; *Rainbow* v. *Young*, 161 Fed. Rep. 830; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Rickert*, 188 U. S. 432.

Their civilization is not inconsistent with their wardship. Report of Bandelier, *supra*.

Their citizenship is consistent with their wardship. The Pueblo Indians were citizens of New Mexico. *United States* v. *Ritchie*, 17 How. 525.

Citizens may well be wards of the Government. *Bowling* v. *United States*, 191 Fed. Rep. 22; *Hallowell* v. *United States*, 221 U. S. 317; *Rainbow* v. *Young*, 161 Fed. Rep. 835; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Logan*, 105 Fed. Rep. 240; *United States* v. *Sutton*, 215 U. S. 291.

The relinquishment of Federal jurisdiction is a political question. *Hallowell* v. *United States*, 221 U. S. 317; *Heckman* v. *United States*, 224 U. S. 413; *Matter of Heff*, 197 U. S. 488; *Lone Wolf* v. *Hitchcock*, 185 U. S. 555; *Tiger* v. *Western Imp. Co.*, 221 U. S. 317; *United States* v.